92-1879

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

PLUMBERS LOCAL UNION NO. 94, AFL-CIO

Petitioner

vs.

KOKOSING CONSTRUCTION CO., ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STARK COUNTY, OHIO, FIFTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the National Labor Relations Act preempt those provisions of Ohio's prevailing wage law that require the State of Ohio to determine, for example, whether work on a public improvement should be characterized as pipefitting or plumbing work, or as general laborer's work, in order to determine the appropriate prevailing wage rate for that work?

2. Does the National Labor Relations Act preempt enforcement of Ohio's "separate bid" laws, as found in Sections 153.50, 153.51, and 153.52 of the Ohio Revised Code, if the statute on its face and/or as applied requires municipalities or other public entities to advertise for bids separately for each type of mechanical labor that is to be performed on a public improvement?

II

STATEMENT OF INTERESTED PARTIES

All interested parties, except the following, are listed in the caption of this case:

State of Ohio, Department of Industrial Relations

Office of the Ohio Attorney General

State of Ohio

Since 28 U.S.C. Section 2403(b) may be applicable, this Petition is being served upon the Attorney General for the State of Ohio.

The Petitioner is unaware of any parent or subsidiary companies of Kokosing Construction Co.

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PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

The Petitioner, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 94 (the "Pipefitters' Union," or the "Union"), the Plaintiff and Appellant in the proceedings below, respectfully prays that a writ of certiorari issue to review the judgments of the Ohio Supreme Court filed on February 10, 1993, and the Ohio Court of Appeals for the Fifth District, Stark County, Ohio, filed on September 28, 1992.

OPINIONS BELOW

The opinion and judgment entry of the Court of Appeals for the Fifth District, Stark County, Ohio, filed on

September 28, 1993, and that Court's denial on December 4, 1992, of the Pipefitters' request for reconsideration are reproduced in the accompanying Appendix. (App. 019, 042). The Ohio Supreme Court's order denying discretionary jurisdiction over the Pipefitters' appeal from the Fifth District Court of Appeal's judgment, which was filed on February 10, 1993, also is reproduced in the accompanying Appendix. (App. 043). References to pages of the accompanying Appendix will be cited as "(App. ___)"

JURISDICTION

The Judgment of the Ohio Supreme Court denying discretionary jurisdiction over this matter was filed on February 10, 1993. This petition, pursuant to

Rule 28.2 of the Rules of the Supreme Court of the United States, was filed within 90 days thereafter. The jurisdiction of this Court is founded on 28 U.S.C. Sections 1254 and 1257.

STATUTES INVOLVED

29 U.S.C. Section 158(b)(i)(D). This generally is referred to as the secondary boycott provisions of the National Labor Relations Act. This statute reads in pertinent part as follows:

> (b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents. . .
>
> * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage

> in, a strike or a refusal in the course of his emloyment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .
>
> * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for emloyees performing such work. . ."

Chapter 4115 of the Ohio Revised Code, which generally sets forth Ohio's "prevailing wage" laws. The relevant

portions of this Ohio law are set forth in the Appendix.

Section 153.50, 153.51, and 153.52 of the Ohio Revised Code set forth Ohio's "separate bid" laws for bidding on public improvement projects. These laws read as follows:

Section 153.50

Separate bids for work and materials.

An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment, or business entering into the improvement.

Section 153.51

Contract may not be awarded for entire work.

When more than one trade or kind of mechanical labor, employment, or business is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate.

Section 153.52

Each contract shall be for only one class of labor or material, exceptions.

The contract for doing the work belonging to each separate trade or kind of mechanical labor, employment, or business, or for the furnishing of materials therefore, or both, shall be awarded by the officer, board, or other authority referred to in section 153.50 of the Revised Code, in its discretion, to the lowest responsive and responsible separate bidder therefor, in accordance with section 9.312 [9.31.2] of the

> Revised Code in the case of any officer, board, or other authority of the state or any public institution belonging thereto, and to the lowest and best separate bidder in the case of a county, township, municipal corporation, or school district, or any public institution belonging thereto, and shall be made directly with him or them in the manner and upon the terms, conditions, and limitations as to giving bond or bid guaranties as prescribed by law unless it is let as a whole, or to bidders for more than one kind of work or materials. Sections 153.50 to 153.52 of the Revised Code do not apply to the erection of buildings and other structures which cost less than ten thousand dollars, except as provided in sections 153.02 and 153.03 of the Revised Code.

I. STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW.

On November 13, 1990, Petitioner, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 94 (the

"Pipefitters" or the "Union"), commenced proceedings against the City of Canton, Ohio ("City"), and against Kokosing Construction Company ("Kokosing") alleging a violation of Ohio's prevailing wage laws on a public improvement undertaken by the City. This action was brought pursuant to Ohio Revised Code Chapter 4115.16 and was filed in the Court of Common Pleas for Stark County, Ohio.[1] Specifically, the

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[1]The Pipefitters in January, 1988, brought an action seeking an order from the Ohio Court of Claims against the Ohio Department of Industrial Relations (ODIR) for its failure to enforce the prevailing wage laws at the Project. ODIR had failed to act in writing on two (2) administrative complaints filed by the Pipefitters regarding the Project. The Pipefitters' action against ODIR was dismissed on jurisdictional grounds in part because the legal remedy provided in O.R.C. Section 4115.16 was available. See, Plumbers Local Union No. 94 v. Ohio Department of Industrial Relations, Case No. 88AP-1047, unreported (Franklin App. 1990) (App. 001).

Pipefitters claimed that Ohio's "prevailing wage" laws at the Canton Waste Water Treatment Project ("Project") were violated because Kokosing, with the City's approval, improperly underpaid prevailing wages for a certain class of work on the Project.[2] (R. 001). Subsequently, Kokosing filed a cross-claim against the City and, without objection, joined Laborers Local Union 1015 (the "Laborers") as a party.

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[2]Under O.R.C. Section 4115.16(B), if ODIR fails to act within sixty (60) days, an "interested party" may file a Complaint in court under that statute in order to have the court determine the prevailing wage issue. Upon filing, the ODIR Director "shall cease investigating or otherwise acting upon the [administrative] complaint" and the Court "shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under Sections 4115.03 to 4115.16 of the Revised Code."

On May 8, 1991, the Union filed a First Amended Complaint. (App. 046). In the amended pleadings, the Union added a claim that Ohio's "separate" bid laws, respectively set forth in Chapters 4115 and Sections 153.50, 153.51, and 153.52 of the Ohio Revised Code, were not being followed by the City. (App. 046). There were no substantive changes in the Pipefitters' prevailing wage claim.

As to its claim arising under O.R.C. Section 4115.16(B), the Pipefitters Union contended that it was an "interested party" under O.R.C. Section 4115.03(F)(3) or (4), and that, as such, it had standing to bring this action. Standing to bring this prevailing wage action has not been challenged. The Pipefitters sought injunctive and declaratory relief, including injunctive relief against the

non-party ODIR Director, as well as an order against Kokosing and/or the City to pay the appropriate prevailing wages to members of the Laborers Union who performed work on the Project.[3] The Pipefitters Union did not seek any pay, backpay, or the assignment of any particular work for its own members. (App. 056-58, 075-76).

As to the other claim, which was brought under O.R.C. Section 153.50, the Pipefitters Union sought injunctive relief to insure that the City, in the future, complied with the "separate bid" requirements of the statute. (App. 057).

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[3] O.R.C. Section 4115.16(B) specifically prohibited the Pipefitters from naming the ODIR Director as a party. It permits the trial court to order the non-party Director to "take such action as will prevent further violation" of the prevailing wage law. See, O.R.C. Section 4115.16(B).

In its entirety, O.R.C. Section 153.50 provides that:

> "An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment, or business entering into the improvement."

(emphasis added).

The Pipefitters filed a motion for partial summary judgment on the issue of liability, while the City and Kokosing filed motions for summary judgment. On December 30, 1991, the trial court

granted summary judgment in favor of Kokosing Construction Company, the City of Canton, and Laborers' Local Union 1015, and denied the Pipefitters' motion for partial summary judgment. (App. 008). The trial court found, without citation to any authority, that the prevailing wage claim was a work jurisdiction issue and, therefore, preempted by the National Labor Relations Act ("NLRA"). The court also refused to consider the "separate bid" claims raised under Section 153.50, though not on preemption grounds. (App. 009). The Pipefitters timely appealed the trial court's judgment. Timely assignments of error were filed by the Petitioner which preserved the constitutional preemption issues. (App. 015).

On September 28, 1992, in a 2-1 decision, the Ohio Court of Appeals, Fifth District, for Stark County, Ohio affirmed the trial court's judgment. That Court held that the application of Ohio's "prevailing wage" law was preempted by the NLRA, since the State courts lacked jurisdiction to determine whether the work performed was plumbing or general labor work. While the trial court had not relied on preemption grounds for dismissing the second claim, that Court also held that Ohio's "separate bid" laws were preempted by the NLRA. In a well-reasoned dissent, Judge Hoffman disagreed. (App. 018, 032). These radical conclusions were based solely on the Court's incorrect assumption that the Pipefitters' Union was attempting to have the completed work

assigned to its own members. (App. 024-25). Not only was there no evidence in the summary judgment proceedings to support this conclusion -- a conclusion that is important to the preemption findings -- the evidence was to the contrary. (App. 075-76).

On October 8, 1992, pursuant to Ohio Appellate Rule 26 and Rule III of the Rules of Practice of the Supreme Court of Ohio, the Pipefitters timely filed an Application for Reconsideration with the Court of Appeals as well as a request to have the matter certified as a conflict with another state court decision to the Ohio Supreme Court. The Pipefitters argued that Ohio's "prevailing wage" and "separate bid" laws are not preempted by the NLRA and that this was not a "work jurisdiction" dispute, showing that they

specifically had disclaimed any attempt to obtain this work through the "prevailing wage" or "separate bid" proceedings.

On October 28, 1992, the Pipefitters timely filed a notice of appeal with the Ohio Court of Appeals. On November 3, 1992, the Ohio Court of Appeals certified this case to the Ohio Supreme Court as being in conflict with Donahue v. Cardinal Construction Co., 11 Ohio App. 3d 204 (Wayne App. 1983), but subsequently denied the Application for Reconsideration. (App. 037, 042). The Pipefitters then timely submitted this certification to the Ohio Supreme Court. (App. 039). The status of the appeal on the "certification of conflict" remains pending before the Ohio Supreme Court. That case has been designated as Ohio

Supreme Court Case No. 92-2443 and it is not clear that the Ohio Supreme Court can or will reach the preemption questions.

On or about November 25, 1992, the Pipefitters, as a protective measure, submitted a Memorandum in Support of Jurisdiction pursuant to Rule I, Section 4 of the Rules of Practice of the Ohio Supreme Court in an effort to have that Court accept discretionary jurisdiction over the constitutional/preemption questions in this case in the event that the City or Kokosing were successful in establishing that jurisdiction on the preemption questions based on the "conflict certification" was inappropriate. On February 10, 1993, the Ohio Supreme Court denied discretionary jurisdiction. (App. 043). That case has been designated as Ohio Supreme Court

Case No. 92-2375. This Petition is addressed to Case No. 92-2375 since that is the case that clearly raises the substantial constitutional and preemption questions as to whether Ohio's prevailing wage and separate bid laws may be constitutionally enforced under the facts of this case or similar facts, or whether such enforcement is preempted by the NLRA.

B. STATEMENT OF THE FACTS

On or about March 30, 1987, the City placed a newspaper advertisement seeking bids for a General Construction Contract for work at the Canton Waste Water Treatment Plant project (the "Project"). The Pipefitters contend that the advertisement for this General Construction Contract, with an estimated

construction cost of approximately $3,418,000.00, improperly included a substantial amount of plumbing and pipefitting work, i.e., a type of "mechanical" work described in O.R.C. Section 153.50, that should have been advertised so as to elicit bids separate from the General Construction Contract bid. The General Construction Contract, which was awarded to Kokosing without the City complying with O.R.C. Sections 153.50, 153.51, or 153.52, included the installation of new aeration compressors, air filters, a diffuser system, piping, valves, dissolved oxygen process, air meters, materials handling equipment, and other appurtenant work. The Pipefitters previously had performed this type of work in Stark County. There was no evidence, however, that the Laborers had

performed this type of work in Stark County. (App. 060-63, 076, 079-85).

Despite the Pipefitters' contention that the City improperly advertised for bids on this Project, the City, which did not deny non-compliance, still has not changed its bidding procedures for future advertisements.

One of the unsuccessful contractors who bid on the General Construction Contract was a local Canton mechanical contractor, Soehnlen Piping Company, a signatory to a Pipefitters' labor contract. Certain work within the advertised bid for the General Construction Contract is considered within the industry as both "plumbing and pipefitting" work and as separate and distinct "mechanical" labor. (App. 060-63). If the City had advertised for

a separate bid for this "mechanical" plumbing and pipefitting work as required by O.R.C. Section 153.50, Soehnlen, which was required to submit an over-all bid for all of the general construction work, would have submitted a separate bid for the "mechanical" plumbing and pipefitting work. Significantly, as a speciality "mechanical" contractor, Soehnlen would have underbid Kokosing, a general contractor, on these "mechanical" items, even utilizing the higher Pipefitters' wage and benefit rates. (App. 066-68).

The record reveals that the City did not find any qualitative difference between the Kokosing and the Soehnlen bids. Instead, the City made its decision based exclusively on the fact that Kokosing underbid Soehnlen on the entire General Construction Contract. It

did not take into account Soehnlen's underbidding of Kokosing on the specific "mechanical" work. Other than its contention that it was not required to comply with the statute, the City could give no specific reason why the "mechanical" labor was not bid separately.

Kokosing, which was granted and performed the General Construction Contract, primarily used employees from outside the Canton area, who were members of Laborers Local 1015, to perform this mechanical pipefitting work. Unlike the Laborers, the Pipefitters already had performed this type of work on waste water treatment plants elsewhere in Stark County, e.g., in Massillon, Alliance, Orrville, and Navarre, Ohio. Such work is included within the work-jurisdiction

clauses of the Pipefitters' collective bargaining contracts for the Canton area. (App. 079-81). No probative evidence was submitted by Kokosing, the City, or the Laborers to establish that the Laborers and/or Kokosing had performed this type of work within Stark County as of the time that the bids were let for the Project, or prior to that time. Under O.R.C. Section 4115.05, prevailing wages are to be determined for the "locality" based on the same type of work being performed under union contracts in that locality. The term "locality" is defined as the County where the Project is to be performed. See, O.R.C. Section 4115.03(D).

Significantly, after the bids were let, Soehnlen made an offer to perform the "mechanical" work for Kokosing using

local labor at a lower cost to the City. However, Kokosing refused, thereby, resulting in higher construction costs for the City, as well as a loss of higher-paying jobs for local labor! (App. 068).

The applicable statute setting forth how prevailing wages are to be determined is O.R.C. Section 4115.05. In part, that statute provides:

> "The prevailing rate of wages to be paid for a legal day's work. . . to laborers, workmen, or mechanics upon public works shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto."

(emphasis added). In this case, the only collective bargaining contract in the Record that was in force at the time that this Project was commenced is the Pipefitters' Agreement.

The above-quoted statute mandates that "prevailing wage" rates be determined by reviewing the collective bargaining agreements or understandings between employers and unions that were "in force," as of the date of the public works contract, for the same trade in the "locality" where the public work is to be performed. Only the Pipefitters performed this type of work in Stark County under a labor agreement in force during the relevant time period. Thus, there could be no "work jurisdiction" issue to decide and, therefore, no preemption of this claim!

It is undisputed that the combined wage and fringe benefit rates in the Pipefitter's contracts in the Stark County "locality" were approximately three dollars ($3.00) per hour higher than the parallel wage and fringe benefit rates that Kokosing actually paid to its employees, the Laborers, who actually did the pipefitting and plumbing work at the Project. Thus, the contractual wages/benefits paid by Kokosing were more than three dollars ($3.00) per hour less than the appropriate prevailing wage, i.e., the wage established by the Pipefitters' standard area labor agreement! Clearly, Soehnlen Piping, the Pipefitter's contractor, and its employees were disadvantaged during the bidding process since Kokosing's estimated bid was based on sub-prevailing

wages, while Soehnlen correctly utilized the correct prevailing wage rates -- its own rate -- when making its bids.

ODIR never conducted an investigation of the Pipefitters' administrative complaints, nor did it seek information from the Pipefitters regarding their performance of this type of work within Stark County.

At most, ODIR informally accepted Kokosing's diversionary tactic that this was a "work juris- dictional" dispute and, then, ODIR took a "hands off" attitude. This "hands off" attitude, however, resulted in ODIR never appropriately investigating the matter or determining whether the Pipefitter's wage rates or the Laborer's wage rates were the correct "prevailing" rates for work on the Project. This is the essence of the Pipefitter's Complaint.

Through this proceeding, the Pipefitters are not, have not, and were not attempting to obtain work on the Project for themselves. Instead, the Pipefitters' Union -- as an "interested part" -- was attempting to enforce Ohio's prevailing wage and separate bid laws and to insure that its signatory contractors and its members are not placed at an unfair competitive disadvantage during the public contract bidding process when they comply with Ohio law but companies, like Kokosing, do not.

Since the remedies sought by the Pipefitters Union never included having the work awarded or assigned to its own members and never included an effort to obtain back pay for its own members, there was not and could not be a work jurisdiction issue that would preempt

enforcement of these state statutes by the Ohio courts. Even if, assuming arguendo, the Pipefitters had multiple motives for pursuing this action, with one of those motives being the legitimate and appropriate enforcement of Ohio's laws, then their case was not and should not be preempted by the NLRA.

III. LAW AND ARGUMENT

OHIO'S PREVAILING WAGE AND SEPARATE BID STATUTES ARE VALID EXERCISES OF LEGISLATIVE AUTHORITY AND ARE NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

A. The Prevailing Wage Statute On Its Face, Or As Applied, Is Not Preempted.

The Pipefitters' arguments are straightforward. The Pipefitters submit that, when any employee (whether non-union, a Pipefitter, or a Laborer) on

a "prevailing wage" job performs the work of a particular trade or craft -- such as pipefitting or plumbing work -- then that employee should be paid the "prevailing wage" rate when he or she does that type of work. The "prevailing wage" determination should be based upon collective bargaining agreements covering that type of work in the county regardless of whether union or non-union employees, actually perform the work.

In this case, there is no factual dispute that the Pipefitters' have performed the same type of "mechanical" work, including work on other waste water treatment plants, within the Canton and Stark County areas during relevant times. Until they were assigned the work on this Project, there is no evidence in the Record that employees of Kokosing, which

is headquartered outside of Stark County in Fredericksburg, Ohio, or the Laborers, ever performed the same type of work at waste water treatment plants in Stark County, even though they may have performed such work elsewhere in Ohio.[4]

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[4]Nevertheless, even if the Laborers had performed such work in Stark County, the Pipefitters' higher wage/fringe benefit rates should be paid regardless of which union (or non-union) employees actually performed the work. Since the purpose of federal and state prevailing wage laws is to prevent the under-cutting of prevailing wages by non-union or union contractors, the highest prevailing rates for the same type of work in the area should be paid, which in this case would be the rates set forth in the Pipefitters' contract, not the Laborer's (subsequent) agreement. Cf., Andersen Construction Co. v. City of Topeka, 228 Kan. 73, 612 P.2d 595, syl. p. 4 (1980); International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co., 36 Ohio St.3d 74, 79 (1988) (Locher, J., dissent). Otherwise, a "sham" or "Company" union easily could be utilized to circumvent the Ohio statute.

Furthermore, since neither the ODIR, nor the courts below, had to determine which of the employee groups should have been awarded the plumbing and pipefitting work, the matter is not preempted. The NLRB only has authority to determine which employees should perform certain work, not what they should be paid. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). On the other hand, in order to resolve the "prevailing wage" issue under Ohio law, the State need only determine which employees, in fact, had performed this type of work within Stark County, not which employees should perform work on a specific project.

Kokosing's pre-emption argument, which the courts below accepted without citation to any authority, primarily was directed to the Pipefitters' claim

regarding Ohio's prevailing wage laws. However, this was a "straw man" argument. The Pipefitters consistently have contended in these proceedings that they were not attempting to obtain work for themselves, but only were attempting to insure that the employees -- who actually performed the work -- were paid the appropriate prevailing wage rates. See, "Plaintiff's Memorandum in Opposition to the Motions for Summary Judgment filed by City of Canton, Kokosing and the Laborers Union" filed December 13, 1991, at 3-9. (App. 075-76).

Moreover, a review of the Pipefitters' demand for relief in its Complaint and Amended Complaint (as well as all of its prior memoranda in this case) establishes that the Pipefitters were not seeking and have never sought

any back pay for their own members who could have performed the work, but who were not awarded this pipefitting work by Kokosing or by the City. (App. 056-58).

Even if the Pipefitters had sought to have ODIR award this work to themselves, only that portion of their claim might be subject to an unfair labor practice proceeding. Nevertheless, that does not mean that enforcement of the prevailing wage laws are preempted for those employees, i.e., the Laborers, who actually did the work. Those Laborers still have a statutory right to be paid the appropriate wages. The Pipefitters Union only has attempted legitimately to utilize the statutory appeal procedures set forth in O.R.C. Section 4115.16 to insure, as an "interested party," that the Laborers are paid correctly now and

in the future so that its own members (and the contractors who employ their members) are not unfairly treated by being out-bid by contractors who do not intend to properly comply with Ohio's prevailing wage and/or job bidding laws. If Kokosing and the City had followed both laws and the Pipefitters were not employed on the Project, so be it. Since this is a legitimate reason -- not prohibited by the NLRA -- for enforcing Ohio's laws, the enforcement of these laws is not preempted. Westmoreland Coal Co., 304 NLRB No. 66 (1991); Realty Maintenance Inc., 265 NLRB No. 173, n.14 (1982).

Once ODIR or the trial court determines that a particular craft has performed the work in question in the county, it must then determine what wage

rates apply. The trial court need not, and should not, consider which craft Kokosing preferred to use, what the relative skills of the Laborers and Pipefitters were, or many of the other factors relevant to a "work juridictional" dispute. Unlike the NLRB, which must engage in a case-by-case analysis and weigh various factors, the trial court need only find that the Pipefitters have performed this type of work on this Project and have performed this type of work <u>within this county</u> under a collective bargaining agreement. The trial court was not asked to issue <u>any</u> orders directing that the work be awarded to the Pipefitters, now or in the future. However, it should have issued an order declaring that the wage rates set by the Pipefitters' collective

bargaining agreement should have been paid regardless of which employees performed that work.[5]

Consequently, it is clear that the Pipefitters' prevailing wage action did not require a "work jurisdiction" determination. Thus, this claim is not pre-empted by the NLRA. The decision of the Ohio courts to the contrary are in conflict with Dillingham Construction,

---

[5]Kokosing cited to In re Atomic Energy Commission, 19 WH Cases 489, 494 (Wage Appeals Board 1967), for the proposition that the federal prevailing wage rate laws are not and were not intended to be a vehicle for the settlement of jurisdictional disputes or the making of work assignments. The Pipefitters have not claimed otherwise. It has been Kokosing, not the Pipefitters, who has mis-characterized the Pipefitters' actual claims in these proceedings. Unlike a work jurisdictional dispute, the trial court need only have determined the amount of wages that should have been paid to the employees, not which employees should have performed the work.

Inc. v. County of Sonoma, 778 F.Supp. 1522 (N.D.Cal. 1991); General Electric Co. v. New York State Department of Labor, 936 F.2d 1448 (2d Cir. 1991); General Electric Co. v. New York State Department of Labor, 891 F.2d 25, 27-28 (2d Cir. 1989); Associated Builders and Contractors v. Curry, 797 F.Supp. 1528 (D.C.Cal. 1992).

B. The "Separate Bid" Statute On Its Face, Or As Applied, Is Not Preempted.

The City's advertisement for bids wrongfully included a significant amount of plumbing and pipefitting work (which constitutes a separate and distinct "mechanical" trade) within the General Construction Contract. Under O.R.C. Section 153.50, the City should have

advertised this "mechanical" work as a separate contract. If it had done so, Soehnlen would have submitted a lower bid on this speciality work than Kokosing even using the higher Pipefitters' wage rates.

While Kokosing suggested that the Section 153.50 claim was pre-empted by the NLRA, Kokosing did not offer any authority for this proposition. Nevertheless, the Court of Appeals, also with no explanation and no citation of authority, erroneously found both of these statutes, i.e., the "prevailing wage" statute and Section 153.50, to be pre-empted.

O.R.C. Section 153.50 establishes the procedure by which the City of Canton is required to advertise bids for public improvements. Nothing under the NLRA

ever was intended to regulate these types of statutes regarding the bidding procedures of a governmental unit of a State. Indeed, the NLRA does not govern governmental entities or the bidding procedures of a governmental unit. See, 29 U.S.C. Section 152(2) (the term "employer" specifically excludes States and their political subdivisions). Thus, the finding of the Court of Appeals that the Section 153.50 claim is pre-empted should not be permitted to stand.

As with the prevailing wage claim, since the Pipefitters had a legitimate reason to pursue their Section 153.50 claim, it is not preempted by the NLRA even if the Union also had a separate secondary motive. See, Westmoreland Coal, supra; Realty Maintenance, supra.

CONCLUSION

For the reasons and law stated above, the Pipefitters respectfully request that this Court accept jurisdiction over this appeal and grant the requested petition.

Respectfully submitted,

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92-1879

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

PLUMBERS LOCAL UNION NO. 94 AFL-CIO

Petitioner

-vs-

KOKOSING CONSTRUCTION CO., ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STARK COUNTY,
OHIO, FIFTH APPELLATE DISTRICT

APPENDIX

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

PLUMBERS LOCAL UNION NO. 94	:	
Plaintiff-Appellant	:	
-vs-	:	
	:	NO. 88AP-1047
OHIO DEPARTMENT OF INDUSTRIAL RELATIONS	:	(REGULAR CALENDAR)
Defendant-Appellee	:	

D E C I S I O N

Rendered on March 29, 1990

GREEN, HAINES, SGAMBATI, MURPHY & MACALA, CO., L.P.A., MR. RONALD G. MACALA and MR. RANDALL VEHAR, for appellant.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, MR. TIMOTHY J. BOJANOWSKI and MR. WILLIAM M. MATTES, for appellee.

APPEAL from the Ohio Court of Claims.

BOWMAN, J.

On August 4, 1988, appellant, Plumbers Local Union No. 94 filed a

complaint for declaratory and injunctive relief in the Ohio Court of Claims seeking to have the Court of Claims order appellee, the Department of Industrial Relations, to designate and classify certain work on the city of Canton waste water treatment project as that of plumbers' work. On September 6, 1988, appellee filed a motion to dismiss pursuant to Civ. R. 12(B)(1) and (6). Appellant filed a memorandum in opposition to appellee's motion and thereafter, appellee filed a response to appellant's memorandum in opposition.

On October 13, 1988, the Court of Claims granted appellee's motion to dismiss and held:

> "***In view of plaintiff's requested relief, the legal relations among the parties, and the statutory directives within R.C. Chapter 4115, I find that an equitable remedy in

the form of declaratory judgment and injunction is inappropriate and contrary to law.

Plaintiff's remedy lies in one of two arenas, to wit: the administrative appeal process of R.C. 4115.15, or in a writ of mandamus.

"This court cannot construe the complaint as one in mandamus because mandamus will not operate against a state agency. ***Furthermore,*** this court is without the authority to issue extraordinary writs.***

"Construing the material allegations within the complaint most favorably for plaintiff leads the court to conclude that defendant's***motion to dismiss is well-taken.****"

Appellant now brings this appeal and asserts the following assignments of error:

"1. THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S REQUEST FOR DECLARATORY RELIEF.

"2. THE COURT OF CLAIMS ERRED IN DISMISSING APPELLANT'S REQUEST FOR INJUNCTIVE RELIEF.

"3. THE COURT OF CLAIMS ERRED IN HOLDING THAT APPELLANT'S REMEDY LIES

IN AN ADMINISTRATIVE APPEAL UNDER O.R.C. SECTION 4115.16."

Appellant's assignments of error are related and will be considered together. In these assignments of error, appellant asserts that the trial court erred in dismissing its request for declaratory and injunctive relief and in holding that appellant's remedy was an administrative appeal pursuant to R.C. 4115.16.

R.C. 2721.02 provides that a court may declare rights, status and other legal relations whether or not further relief is or could be claimed. An action for declaratory judgment may be entertained by a court, in the exercise of its sound discretion, where a justiciable controversy exists between adverse parties, and speedy relief is necessary to the preservation of the rights which may otherwise be impaired or

lost. Burger Brewing Co. v. Liquor Control Comm. (1973), 34 Ohio St.2d 93.

R.C. 2727.02 addresses the causes for an injunction and states:

> "A temporary order may be granted restraining an act when it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part of it, consists in restraining the commission or continuance of such act, the commission or continuance of which, during the litigation, would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, threatens or is about to do, or is procuring or permitting to be done, such act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual."

The granting of declaratory relief and the issuance of an injunction are matters of judicial discretion and, absent an abuse of discretion by the trial court, an appellate court is not permitted to question the trial court's

decision to deny or grant such relief. Control Data Corp. v. Controlling Board (1983), 16 Ohio App.3d 30. See, also, Perkins v. Quaker City (1956), 165 Ohio St. 120; Bilyeu v. Motorists Mut. Ins. Co. (1973), 36 Ohio St.2d 35. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. Beacon Journal Pub. Co. v. Stow (1986), 25 Ohio St.3d 347.

In this case, the trial court held that appellant's remedy was either an administrative appeal, pursuant to R.C. 4115.16, or in a writ of mandamus. The court then correctly stated that the Court of Claims is without authority to grant relief in the form of a writ of mandamus. Rosso v. Dept. of Adm. Serv. (1982), 4 Ohio App.3d 312.

This court finds that the trial court did not abuse its discretion in its decision. The trial court correctly determined that appellant had a remedy available to it via an administrative appeal. While the fact that appellant may have had another remedy available to it does not prevent the trial court from granting appellant's request for declaratory and injunctive relief, Gannon v. Perk (1976), 46 Ohio St.2d 301; see, also, Arbor Health Care Co. v. Jackson (1987), 39 Ohio App.3d 183; and Civ. R. 57, such a decision rests within the sound discretion of the trial court. Accordingly, appellant's three assignments of error are not well-taken and are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

REILLY, P.J., and McCORMAC, J., concur.

Filed December 30, 1991
IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938-OC
Plaintiff	:	JUDGE HAAS
-vs-	:	
KOKOSING CONST. CO., ET AL.	:	JUDGMENT ENTRY
Defendants	:	

This matter came on for consideration on the motion for summary judgment filed by the defendant, Kokosing Construction Company, the motion for summary judgment filed by the City of Canton, the motion for summary judgment filed by Laborers' Local 1015, and the motion for partial summary judgment filed by plaintiff, Plumbers Local Union No. 94. The Court finds the motions for summary judgment filed by defendants Kokosing Construction Company, the City of Canton and Laborers'

Local 1015 to be well taken and hereby sustains the same. The Court finds the motion for partial summary judgment filed by the plaintiff, Plumbers Local Union No. 94, to be not well taken and hereby overrules the same.

In May, 1987, the City of Canton advertised and solicited bids for the construction of certain improvements to its water pollution control center (the "project"). The project was separated into four contracts: general construction, heating, ventilating and air conditioning installation, plumbing installation, and electrical installation. The defendant, Kokosing, submitted a bid on the general construction portion of the project. On May 27, 1987, the City of Canton and Kokosing entered into a general construction contract for the project.

The contract was subject to the state prevailing wage law, O.R.C. Chapter 4115.

The plaintiff asserts that wages paid pursuant to the contract by Kokosing were in violation of the prevailing wage law and that said work was plumbing work and not laborer's work. The Court finds no material issue of fact in controversy concerning the fact that Kokosing did pay the prevailing wage rate for laborers for the work that was performed and did not pay the plumbers' rate for said work. The Court finds that the issue before the Court is a work jurisdiction issue which is preempted by the National Labor Relations Act.

Having found that the issue as asserted by the plaintiff is preempted by the National Labor Relations Act, this Court also finds that the claim of the

plaintiff for wages not paid in compliance with the prevailing wage law, is barred by the two year statute of limitations. In the present case, the project was completed on or about September 1, 1988, and the within action was filed on November 13, 1990. The Court finds that Section 2305.11 is controlling.

Additionally, this Court finds that the action of the plaintiff for declaratory relief is moot in that the project has been completed since September, 1988. The plaintiff admits that it is not attempting to obtain work for members of its union, but rather is seeking to insure that those laborers who did perform the work are paid the appropriate prevailing wage. The plaintiff, in essence, is attempting to obtain a precedent by obtaining a

decision that the type of work performed pursuant to the contract between the City and Kokosing should be paid at the prevailing wage for plumbers should a similar situation occur in the future. This Court is not inclined to issue a ruling prospective in nature whereby different contracts with different parties and different contract specifications may well be involved. There is no actual controversy in the present case which needs to be adjudicated. The contract has been completed for some period of time and the claim for prevailing wages is barred by the statute of limitations.

Additionally, this Court finds no basis to enter a ruling for declaratory relief against the City based on the allegations of the plaintiff that the

City is inclined to bid projects in the future in a similar fashion to the procedure used in the case sub judice. Given the multitude of factors which most certainly would be different in the future, this Court finds that it would be unduly entering into an area of uncertainty and speculation to make such a ruling.

For the foregoing reasons, the motion for summary judgment filed by the contractor, Kokosing, the City of Canton, and the Laborers' Union is hereby sustained, Plumbers Local Union No. 94 is hereby overruled.

It is therefore Ordered, Adjudged and Decreed that judgment is hereby granted in favor of the defendants, Kokosing Construction Company, the City of Canton, and Laborers' Union No. 1015 on all

claims of the plaintiff, Plumbers' Local Union No. 94, on its amended complaint and the action is hereby dismissed at plaintiff's costs.

JOHN G. HAAS, JUDGE

Copies to:
Atty. Randall Vehar
Atty. Roger Sabo
Atty. William Hamann
Atty. Lawrence Oberdank

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED TO THE EXTENT THAT IT DENIED, OR OTHERWISE DISMISSED, THE PIPEFITTERS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS CLAIMS BROUGHT PURSUANT TO O.R.C. CHAPTER 4115 AND/OR O.R.C. SECTION 153.50, AND FURTHER ERRED BY FINDING THAT KOKOSING PAID THE APPROPRIATE PREVAILING WAGE FOR THE PLUMBING AND PIPEFITTING WORK PERFORMED BY THE LABORERS.

ASSIGNMENT OF ERROR NO.2:

THE TRIAL COURT ERRED BY FINDING THAT THE ISSUES BEFORE IT WERE WORK JURISDICTIONAL ISSUES PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT ERRED BY APPLYING AND/OR MISAPPLYING A TWO (2) YEAR STATUTE OF LIMITATIONS AND/OR BY APPLYING O.R.C. SECTION 2305.11 TO THE CLAIMS BROUGHT PURSUANT TO O.R.C. CHAPTER 4115, AND/OR SECTION 153.50.

ASSIGNMENT OF ERROR NO. 4:

THE TRIAL COURT ERRED BY DISMISSING THE PREVAILING WAGE CLAIM AGAINST THE CITY

WHEN THE APPELLEES FAILED TO ADEQUATELY AND FULLY SUBSTANTIATE ITS AFFIRMATIVE STATUTE OF LIMITATIONS DEFENSE.

ASSIGNMENT OF ERROR NO. 5:

THE TRIAL COURT ERRED BY FINDING THAT THE REQUEST FOR DECLARATORY RELIEF ON THE PREVAILING WAGE CLAIM WAS MOOT.

ASSIGNMENT OF ERROR NO. 6:

THE TRIAL COURT ERRED BY DISMISSING THE PIPEFITTERS' REQUEST FOR DECLARATORY RELIEF AGAINST THE CITY OF CANTON ON THE O.R.C. SECTION 153.50 CLAIM WITHOUT ADDRESSING THE MERITS OF THAT CLAIM.

ASSIGNMENT OF ERROR NO. 7:

THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE CITY OF CANTON WAS REQUIRED AND/OR WILL BE REQUIRED IN THE FUTURE TO COMPLY WITH O.R.C. SECTION 153.50.

ASSIGNMENT OF ERROR NO. 8:

THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE CITY DID NOT COMPLY WITH THE REQUIREMENTS OF O.R.C. SECTION 153.50.

ASSIGNMENT OF ERROR NO. 9:

THE TRIAL COURT ERRED BY FAILING TO STRIKE PARAGRAPH NINE (9) OF THE

AFFIDAVIT OF DANIEL WALKER DATED NOVEMBER 19, 1991.

ASSIGNMENT OF ERROR NO. 10:

THE TRIAL COURT ERRED BY FAILING TO GRANT A DEFAULT JUDGMENT AGAINST THE LABORERS' UNION.

Dated September 28, 1992

IN THE COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PLUMBERS LOCAL UNION NO. 94 :	CASE NO. CA-8865
Plaintiff :	
-vs- :	
KOKOSING CONST COMPANY, ET AL:	JUDGMENT ENTRY
Defendants:	

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

_____

_____

_____

JUDGES

Filed: September 28, 1992
COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PLUMBERS LOCAL UNION NO. 94, AFL-CIO	:	JUDGES: Hon. Norman J. Putman, P.J.
	:	Hon. Iren B.
Plaintiff	:	Smart, J.
	:	Hon. William B.
-vs-	:	Hoffman, J.
	:	
KOKOSING CONST. CO., ET AL.	:	CASE NO. CA-8865
	:	O P I N I O N
Defendants	:	

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Case No. 90-1938-OC

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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SMART, J.

This is an appeal from a summary judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of defendants-appellees, Kokosing Construction Company (Kokosing), the City of Canton (Canton), and Local 1015, Laborers International Union of North America, AFL-CIO (the laborers union), and against plaintiff-appellant, Plumber's Local Union No. 94 (appellant). The trial court found that the dispute between the parties is a work jurisdiction issue which was preempted by the National Labor Relations Act, that it was barred by the statute of limitations, and was at least partially moot.

Appellant assigns ten errors to the trial court which, because of their

length, are attached and incorporated herein by reference.

Appellant has not complied with Local App. R. 4(D), which states:

> ...The brief of appellant shall contain... where a summary judgment is appealed, a statement on a separate page following the assignments of error, declaring whether the claim is that the judgment is inappropriate on the undisputed facts or that a genuine dispute exists as to a material fact or facts, coupled with a separate statement of a specific fact issue or issues claimed in the trial court to have been material or genuinely disputed...Appellant's failure to comply with these rules...is failure to prosecute the appeal for which dismissal may be entered sua sponte....

We prefer to address this appeal on its merits. Appellant appears in its brief to argue that the trial court's summary judgment is inappropriate on the undisputed facts and as a matter of law. The trial court's judgment entry

articulates the following facts without challenge from appellant:

In May, 1987, the City of Canton advertised and solicited bids for the construction of certain improvements to its water pollution control center. This project was separated into four contracts: a general construction contract, a heating, ventilating and air conditioning contract, a plumbing contract, and an electrical contract. Kokosing submitted a bid on the general construction portion of the project. On May 27, 1987, Canton and Kokosing entered into a general construction contract for the project. This contract was subject to the state prevailing wage law governed by R.C. Chapter 4115.

I & II

Appellant's first assignment of error urges that the trial court committed

reversible error in overruling its motion for partial summary judgment. Obviously a trial court can never commit reversible error in overruling a motion for summary judgment because such a judgment is interlocutory and capable of correction by the trial court prior to or upon the entry of final judgment.

The basic premise underlying all of appellant's claims and causes of action is that the work that Kokosing's laborers performed as advertised by Canton, awarded to Kokosing, and performed by the laborers union, was improperly characterized as labor, when in fact it should have been characterized as plumbing work. Thus, appellant's claim that although Kokosing paid its workers the prevailing laborer wage, this nonetheless violated the prevailing wage

statutes because the workers who performed these jobs should have been paid the higher plumbers prevailing rate. Without this basic premise, all of appellant's arguments fall.

As the trial court correctly found, the issue of whether the work performed here was plumbing or general labor is preempted by the National Labor Relations Act. Thus, the trial court lacked jurisdiction to make the findings that appellant has called for, namely that this was plumbing work that should have carried with it plumbers rates. We add that neither does this court have jurisdiction to make these findings.

29 U.S.C. 158(b)(4)(d) defines as unfair labor practice the forcing or requiring any employer to assign a particular work to employees in a

particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class. 29 U.S.C. 160 directs the National Labor Relations Board to hear and determine disputes in these unfair labor practices. We find that appellant seeks, under a variety of captions and causes of action, to require the employers here to assign this work to employees in plumbing, rather than to employees classified as laborers. This is precisely and squarely within the purview of 29 U.S.C. 158.

R.C. Chapter 4115 governs disputes over what the prevailing rate shall be within the same trade or occupation. It does not apply to disputes over classification of work. Chapter 153

requires separate bids for work materials, and requires the state to pay the prevailing local wage for each trade or occupation. It does not apply to disputes over classifications.

The first and second assignments of error are overruled.

III

The trial court here held that R.C. 2305.11 controls and that a two-year statute of limitations applies. Appellant cites us to Harris v. Atlas Single Ply Systems (1992), 64 Ohio St.3d 171, which held:

> 'Minimum wages,' as used in R.C. 2305.11(A), does not encompass claims based on the failure to pay prevailing wage rates for work on public improvements as set forth in R.C. 4115.10.
>
> Syllabus by the court.

All of appellant's claims pursuant to R.C. Chapters 153 and 4115 presume that

appellant is correct in its basic premise that the work in question was plumbing work and not laborer work. Because we find that the trial court could not adjudicate this preempted federal claim, we find that it is utterly irrelevant whether the trial court found that the statute of limitations had run. Appellant cannot prevail on either of these claims regardless of when the cause of action accrued, or when it filed its complaint.

The third assignment of error is moot.

IV, V, VI, VII & VIII

Appellant does not raise the issue of whether the city complied with R.C. 153.50. Appellant does not challenge the fact that the city did require separate bids for this work. Appellant simply challenges how the work was separated and

categorized. Accordingly, we find that although appellant has couched its complaint in terms of R.C. 4115 and 153, the issues it raises are not properly brought under those provisions, but rather are preempted by the National Labor Relations Act.

The fourth, fifth, sixth, seventh, and eighth assignments of error are overruled.

IX

Paragraph nine of Walker's affidavit states:

> At all times, Kokosing paid its workers on the Project the prevailing wages as required by the contract and Ohio's prevailing wage law.

Appellant urges that this time was a statement of ultimate fact and/or a legal conclusion, and hence not admissible.

Assuming arguendo that appellant is

correct, we find this is not prejudicial error for any number of reasons. First and foremost, a trial court sitting as finder of fact is presumed to consider only admissible evidence, State v. Eubank (1979), 60 Ohio St.2d 183, 187. Here, where the trial court is not finding facts but reviewing the controversy to determine whether or not there are material facts in dispute, the same consideration applies. Further, this matter was not in genuine dispute before the trial court, because the complaint asks the trial court to make a determination that it lacked jurisdiction to make, to-wit, that the laborers had performed plumbing work for which they should be paid plumbers rate.

The ninth assignment of error is overruled.

X

Kokosing joined as party co-defendants the laborers union, whose members actually performed the work in question. Our review of the complaint and amended complaint leads us to conclude that appellant did not pray for any relief from the trial court as to the defendants. Appellant was not prejudiced by the trial court's refusal to enter default judgment. This had no effect on the final outcome herein.

The tenth assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Putman, P.J. concurs.

Hoffman, J. concurs in part
and dissents in part.

_____

_____

_____
JUDGES

IBS/la 0820 0824

HOFFMAN, J., CONCURRING IN PART AND DISSENTING IN PART.

I concur in the majority's disposition of appellant's first, sixth, seventh, ninth, and tenth assignments of error. However, I respectfully disagree with the majority's conclusion that this case is pre-empted by federal labor law.

Under R.C. 4115.16(B), an "interested party" has standing to bring a prevailing wage claim. Though appellant does not stand to realize any pecuniary gain in the instant controversy, it is nonetheless an interested party under the statute. Obviously its interest rests in the bidding of future contracts.

Resolution of prevailing wage cases would seem to often, if not always, tangentially involve "work jurisdiction" questions. However, this tangential involvement should not lead to the

automatic conclusion that state courts lack jurisdiction to resolve the underlying prevailing wage dispute.

The majority and trial court regard appellant's claims as calling of resolution of which employees' union should perform the work. The more appropriate inquiry in a prevailing wage case is which employees' union has performed this specific type of work in the past within the same "locality." This is the essence of a prevailing wage case and distinguishes it from a "work jurisdiction" case.

The trial court need not enter any order directing that the work be awarded to any particular employees' union now or in the future. The trial court must merely determine what amount of wages are to be paid to the employees who performed

the work. I would sustain appellant's second assignment of error.

Likewise I would sustain appellant's third and fourth assignments of error. The statute of limitations found in R.C. 733.60 is clearly not applicable because the relief sought is not to enjoin the performance of a contract. The two year statute of limitations in R.C. 2305.11 is inapplicable because "prevailing wages" is not synonymous to "minimum wages of overtime compensation." Harris v. J.A. Schultz & Son, Inc., (3/30/89), Defiance App. No. 4-87-4, unreported, and Harris v. J.A. Schultz & Son, Inc. (7/17/87), Wood App. No. 86-81, unreported. Though I recognize these two cases involved a different plaintiff, the Ohio Director of Industrial Relations, the same reasoning should apply to a suit brought by any

"interested party." Tango v. Production Machinery Corp. (1/3/89), Lake App. No. CA-13-019, unreported.[1] The six year statute of limitations contained in R.C. 2305.07 would seem more appropriate.

Furthermore, appellant's claim for declaratory judgment was not rendered moot by completion of the project. Still at issue is whether the employees of Kokosing have been fully compensated under the prevailing wage and if ultimately determined adverse to Kokosing, whether the trial court should order the Ohio Director of Industrial Relations Commission prevent further violation.

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[1] I would reconsider our decision in Harris v. Atlas Single Ply Systems, Inc. (6/25/91), Guernsey App. No. 90-CA-32, unreported.

Appellant's fifth assignment of error should be sustained.

Appellant's suggestion that the trial court's dismissal of its request for declaratory relief versus the appellee City of Canton was error is flawed. Appellant relies upon the fact that the City of Canton took the position that it was not bound at all to comply with R.C. 153.50. This does not mean it will necessarily do so in the future though perhaps so inclined. This issue is not yet ripe as to the City of Canton. The sixth and seventh assignments of error should be overruled.

JUDGE WILLIAM B. HOFFMAN

WBH/la 0909 0911 0922

Dated November 3, 1992

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94, AFL-CIO	:	CASE NO. CA-8865
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. CO., ET AL.	:	JUDGMENT ENTRY
Defendants	:	

Upon application of Plaintiff-Appellant, and for good cause shown, it is hereby

ORDERED that the record in this case be certified to the Supreme Court of Ohio for review and final determination on grounds that the Judgment issued in this case by this Court on September 28, 1992, is in conflict with the Opinion and Judgment issued by the Ninth Judicial District Court of Appeals in Donahue, et

al. v. Cardinal Construction Company, et al., 11 Ohio App.3d 204 (Wayne Co., 1983).

JUDGE

JUDGE

JUDGE

December 2, 1992

Marcia J. Mengel, Clerk of Courts
Ohio Supreme Court
State Office Tower
30 E. Broad Street
Columbus, OH 43266-0419

Re: Plumbers Local Union No. 94 AFL-CIO v. Kokosing Construction Company, et al., Stark County Court of Appeals Case No. CA-8865

Dear Ms. Mengel:

Enclosed for filing is the Judgment Entry dated November 3, 1992, by the Stark County Court of Appeals certifying the above-captioned case to the Ohio Supreme Court as being in conflict with the Opinion and Judgment entered in Donahue, et al., v. Cardinal Construction Company, et al., 11 Ohio App. 3d 204 (Wayne Co. 1983). Also enclosed is Check No. 6451 in the amount of $40.00 for the filing fee in this matter.

By a copy of this letter, I hereby certify that this letter with the attached judgment entry is being served by regular U.S. mail on this same date to the following attorneys of record in this case:

Lawrence M. Oberdank (0007210)
ROBERT E. SWEENY CO., L.P.A.
1500 Public Square
55 Public Square
Cleveland, OH 44113
(216) 696-0606
Attorney for Appellee
Laborers Local Union 1015

Roger L. Sabo (0013215)
SCHOTTENSTEIN, ZOX & DUNN
2500 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 221-3211
Attorney for Appellee
Kokosing Construction Company

William J. Hamann (0026600)
218 Cleveland Avenue, S.W.
Canton, OH 44702
(216) 454-8056
Attorney for Appellee
City of Canton

Please see that this is filed with the Supreme Court by December 3, 1992, as required by Rule III of the Rules of Practice of the Supreme Court of Ohio.

For your information, on November 24, 1992, this Law Firm also filed a Memorandum in Support of Jurisdiction regarding the same above-captioned case. Consequently, the Supreme Court may well want to give the same case number to these matters regardless of whether the appeal is accepted as a matter of right or as a matter of discretion.

If you have any questions on these matters, please feel free to call me.

Very truly yours,

RANDALL VEHAR
(0008177)

RV/kjd
Enclosures

cc: Lawrence M. Oberdank
Roger L. Sabo
William J. Hamann
Daniel Fonte

Dated December 4, 1992

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. CA-8865
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	JUDGMENT ENTRY
Defendants	:	

Motion for reconsideration overruled.

JUDGE IRENE B. SMART

JUDGE NORMAN J. PUTMAN

JUDGE WILLIAM B. HOFFMAN

THE SUPREME COURT OF OHIO

1993 TERM

TO WIT: FEBRUARY 10, 1993

PLUMBER'S LOCAL UNION NO. 94, AFL-CIO	:	CASE NO. 92-2375
Appellant	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	E N T R Y
Appellees	:	

Upon consideration of the motion for an order directing the Court of Appeals for Stark County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Green, Haines, Sgambati, Murphy & Macala.

(Court of Appeals No. CA8865)

THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1993 TERM

TO WIT: APRIL 14, 1993

PLUMBERS LOCAL UNION NO. 94, AFL-CIO	:	CASE NO. 92-2443
Appellant	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	E N T R Y
Appellees	:	

This cause is pending before the Court on the certification of conflict by the Court of Appeals for Stark County. Upon consideration of appellant's motion for leave to file record and brief instanter,

IT IS ORDERED by the Court that said motion for leave to file instanter be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

Dated April 22, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND/OR A WRIT OF MANDAMUS
Defendants	:	

1. Plaintiff, Plumbers Local Union No. 94 (hereinafter the "Union"), is an unincorporated and bona fide organization of labor, as set forth in Section 4115.03(F)(3) of the Ohio Revised Code, which is authorized to represent employees who perform plumbing and pipefitting work on construction projects that are subject to Chapter 4115 of the

Ohio Revised Code, including the "public improvement" at issue in this case. The Union also exists for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees and industries affecting commerce. As such, the Union is an "interested party" pursuant to Section 4115.01(F)(3) of the Ohio Revised Code.

2. The Union is also an unincorporated association capable of suing on its own behalf and on behalf of those who are its members (many of whom are citizens and/or residents of the City of Canton), or who it otherwise represents pursuant to Section 1745.01 of the Ohio Revised Code.

3. The Union is bringing this action as an incorporated association, as an

"interested party," as a bona fide organization of labor, and on behalf of its members, including those who are citizens or residents of the City of Canton, as permitted by Section 1745.01 of the Ohio Revised Code.

4. Defendant Kokosing Construction Co. (hereinafter "Kokosing") is a corporation licensed to do business and doing business within the State of Ohio with an office at 220 Market Avenue South, Canton, Ohio 44702.

5. Defendant City of Canton is a municipal corporation in Stark County, Ohio, capable of being sued. Robert Smith is the Housing Officer for the City of Canton and, as such, he has been delegated the responsibility to ensure that the City of Canton is in compliance with Ohio's prevailing wage rate and

separate bids laws as set forth in Chapters 4115 and 153 of the Ohio Revised Code. Mr. Smith has an office located at Canton City, Hall, 5th Floor, Canton, Ohio 44702.

6. The City of Canton is a "public authority" as that term is used in Section 4115.03(A) of the Ohio Revised Code and it is required to abide by Section 153.50 of the Ohio Revised Code.

7. On or about September 1, 1987, the City of Canton undertook a project to improve its waste water treatment plant (hereinafter the "Project"). This construction project is a "public improvement" as that term is used in Section 4115.03(C) of the Ohio Revised Code. Consequently, the wages and benefits that are to be paid by contractors and subcontractors, who

performed construction work on this "public improvement," are subject to Ohio's prevailing wage law as set forth in Sections 4115.03 through 4115.16 of the Ohio Revised Code.

8. Pursuant to Section 153.50 of the Ohio Revised Code, the City of Canton had and has a statutory obligation to require separate and distinct proposals to be made for furnishing work for this and other public improvements for each separate and distinct trade or kind of mechanical labor, or employment, required for such improvements.

9. Upon information and belief, the City of Canton has not complied with Section 153.50 of the Ohio Revised Code on other projects, did not comply with Section 153.50 of the Ohio Revised Code on this project, and did not separately

bid the mechanical piping including the fitting, laying, fabricating, or otherwise installing the large and/or complex piping for the Project, but wrongfully included such work within its bid for general construction.

10. Defendant Kokosing received the bid from the City of Canton to be the general contractor on the Project. As part of its agreement with the City of Canton, Defendant Kokosing was contractually and statutorily required to pay its employees (and/or to ensure that the employees of its subcontractors pay its employees) the prevailing wage rates as properly determined under Chapter 4115 of the Ohio Revised Code. The failure of Defendant City of Canton to comply with Section 153.50 affected the ability to

make and/or apply proper wage rates to the Project.

11. Since on or about September 1, 1987, the City of Canton, by and through Kokosing and/or Kokosing's sub-contractors, has performed construction work on the Project. A significant portion of such construction work was of the same type of work, trade, or occupation, that has historically and typically been performed in the Canton locality by plumbers and/or pipefitters represented by the Union. In fact, employees represented by Plaintiff performed such similar work at this same Project during the previous major overhaul, modification, and/or addition at said Project.

12. Chapter 4115 and Section 153.50 of the Ohio Revised Code requires that

the prevailing wages and benefits for the type of work described in the preceding paragraph must be established by the collective bargaining agreements negotiated by the Union throughout the Canton locale (hereinafter the "Prevailing Wage") and that such work may be let only after separate bid proposals are sought, required, and made.

13. By failing to properly advertise, pay, and/or insure payment of the Prevailing Wage to employees performing plumbers-and-pipe-fitters-type work, Defendants and/or their agents and/or subcontractors have not complied with Ohio's prevailing wage and/or separate bid laws, regarding plumbers-and-pipe-fitters-type work, performed at the Canton Project.

14. Because Defendants have failed to comply with Ohio's prevailing wage and/or separate bid laws, the Union and its members and other employees represented by the Union, including those who are citizens or residents of the City of Canton, have suffered severe and irreparable harm.

15. The Union and its members and/or other employees represented by the Union, and/or the interested party (as described in Sections 4115.03(F)(1) and (2) of the Ohio Revised Code) that employs or would have employed persons represented by the Union, unfairly have been placed at a disadvantage in obtaining said work, because said work was performed by other employees at a lower wage/benefit rate than required by Ohio law and at a lower rate than would have been paid to the

Union's members and other employees represented by the Union.

16. The person represented by the Union, who are residents or citizens of the City of Canton, have been harmed since they have not had the advantage of the City fully complying with all applicable laws.

17. Upon information and belief, Defendant City of Canton has not complied with Section 153.50 on other projects. Consequently, there is a reasonable likelihood that it will not comply with these statutory requirements in the future, thereby justifying injunctive relief and/or a writ of mandamus ordering the City to comply with this statute.

18. On or about January 13, 1988, Plaintiff, as an interested party, filed a complaint with the Ohio Director of

Industrial Relations alleging violations of Ohio's prevailing wage laws, which was received by the Department of Industrial Relations by January 29, 1988. More than sixty (60) days have passed since the filing of this Complaint and the Director of Industrial Relations has not ruled on the merits of this Complaint. Consequently, this Court has jurisdiction, pursuant to Section 4115.16(B) of the Ohio Revised Code, to consider this Complaint.

WHEREFORE, Plaintiff demands that this Court:

1. DECLARE, ADJUDGE and DECREE that Defendants have violated Ohio's prevailing wage rate and separate bid laws by not ensuring that the Project was properly advertised or let for bid and/or the prevailing wage was properly paid for

the construction and/or plumbers and pipefitters type of work performed at the Project;

2. Enter an order requiring Defendants, jointly and severally, to compensate those employees and/or persons, who performed construction work at the Canton Project, at the appropriate Prevailing Wage rate;

3. Enter an order and/or writ of mandamus requiring the City of Canton to comply with prevailing wage and/or the separate bid laws in the future;

4. Enter an order directing the Director of Ohio Department of Industrial Relations, pursuant to Section 4115.16(B) of the Ohio Revised Code to take appropriate actions to prevent further violations of Ohio's prevailing wage laws;

5. Enter an award of attorney's fees and costs for Plaintiff pursuant to Section 4115.16(D) of the Ohio Revised Code; and

6. Award such other relief as this Court deems just and proper.

Respectfully submitted,

GREEN, HAINES, SGAMBATI,
MURPHY & MACALA CO., L.P.A.

By _____

RONALD G. MACALA
RANDALL VEHAR
Attorneys for Plaintiff
The Belden/Whipple Bldg.
4150 Belden Village St.
Suite 604
P.O. Box 35186
Canton, Ohio 44735
Telephone: 216-493-1570
(38/7/35)

CERTIFICATE OF SERVICE

I herby certify that a copy of the foregoing First Amended Complaint for Declaratory and Injunctive Relief and/or a Writ of Mandamus was forwarded by regular U.S. mail, postage prepaid, to ROGER L. SABO and JOHN J. KRIMM, JR., MILLISOR & NOBIL, 41 South High Street, Sutie 2195, Columbus, Ohio 43215, Attorney for Defendant Kokosing Construction Co.; LARRY OBERDANK, OBERDANK & COWAN, 1130 Standard Building, Cleveland, Ohio 44113, Attorney for Laborers Local 1015; and WILLIAM J. HAMANN, City of Canton, 218 Cleveland Avenue, S.W., Canton, Ohio 44702, Attorney for City of Canton, on this 22nd day of April, 1991.

RANDALL VEHAR (0008177)
Attorney for Plaintiffs

Dated: November 12, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	AFFIDAVIT OF ROBERT KRESS
Defendants	:	

I, ROBERT KRESS, being first duly sworn according to law, depose and state as follows:

1. I am President of the Soehnlen Piping Company. I have been involved in the plumbing and pipefitting business for twenty-four (24) years. I have experience in, familiarity with, and expertise in this industry. Frequently, I have been involved in preparing bids

for my company on public projects within the State of Ohio and I have a familiarity with that bidding process.

2. Within our industry, plumbing and pipefitting generally is considered a separate and distinct trade and/or kind of "mechanical" labor, employment, or business.

3. I have been provided and have reviewed the document that is attached hereto and made a part hereof and which is designated as Plaintiff's Exhibit "C," which I understand is from the Smith deposition taken in this case. I understand this document to be a tabulation and comparison of the bids made on the Canton Waste Water Treatment Project, which I understand is at issue in the above-captioned case.

4. Based upon my experience in the industry, it is my professional opinion that the items on Plaintiff's Exhibit "C," which are designated as Item Nos. 11370, 11372, 11376, 11610, 13310, 15061, 15062, 15063, 15100, 15120, 15250, constitute plumbing and pipefitting work and, as such, constitute separate and distinct mechanical labor, employment, or business.

5. If the City of Canton had separately bid the plumbing and pipefitting work and/or the mechanical work, that is described in the previous paragraph, Soehnlen Piping Company would have placed a separate bid for that work. Comparing these particular items from Soehnlen's general bid on this project with the same items on Kokosing's general bid, Soehnlen would have under bid

Kokosing for this plumbing and pipefitting and/or mechanical work.

6. Soehnlen's bid, as reflected in the attached Plaintiff's Exhibit "C," was based on the assumption that Soehnlen would pay its employees the prevailing wages of Plumbers and Pipefitters, as provided for in the labor agreement between Soehnlen and the Plaintiff in this case.

7. Based upon my knowlege of the industry, the wage rates and fringe benefits for members of the Plaintiff are higher than the wage rates and fringe benefits of the members of the Laborers Union, who I understand performed the plumbing and/or pipefitting work at the Canton Waste Water Project for Kokosing.

8. The employees, who would have performed the plumbing and pipefitting

work for Soehnlen if Soehnlen had been awarded the bid to perform such work for the City of Canton, are primarily from Canton and the surrounding area.

9. Based upon my knowledge of the industry, it is my understanding that many, if not indeed most, of Kokosing's employees who performed work at this Project were not from the Canton and surrounding area.

10. I am over the age of eighteen (18) years and, unless otherwise indicated, have personal knowlege of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

_____

ROBERT KRESS

SWORN TO before me and SUBSCRIBED in my presence, this 12th day of November, 1991.

NOTARY PUBLIC

Dated: December 18, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	SECOND AFFIDAVIT OF ROBERT KRESS
Defendants	:	

I, Robert Kress, being first duly sworn according to law, depose and state as follows:

1. This affidavit is a supplement to my earlier affidavit dated November 12, 1991, in this case.

2. I have reviewed the Supplemental Affidavit of Daniel Walker dated December 12, 1991, that has been submitted in this case.

3. In reference to Paragraph Four (4) of my earlier affidavit submitted in this case, if Soehnlen Piping Company had been permitted to submit a separate bid for the plumbing and pipefitting work described in Paragraph Four (4) of my earlier affidavit, Soehnlen would not have changed its cost estimates for the items that I have described as being mechanical or plumbing and pipefitting items in Paragraph Four (4). Consequently, I still believe that Soehnlen would have underbid Kokosing for the mechanical work if Soehnlen had been permitted to bid separately on this mechanical work. Attached hereto is a true and accurate copy of Tabulation of Bids (Plaintiff's Exhibit "C") that I reviewed and have referred to in preparing both of my affidavits.

4. After Kokosing Construction Company was awarded the general construction contract for the Canton Waste Water Treatment Plant in 1987, Soehnlen offered to Kokosing to perform the mechanical work on this project for the same cost on these items as Soehnlen bid to the City of Canton. Kokosing refused.

5. I am over the age of eighteen (18) and have personal knowledge of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

_____
ROBERT KRESS

SWORN TO before me and SUBSCRIBED in my presence, this 18th day of December, 1991.

_____
NOTARY PUBLIC

Dated: April 22, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	**AFFIDAVIT OF DANIEL FONTE**
Defendants	:	

I, DANIEL FONTE, being first duly sworn according to law, depose and state as follows:

1. I am the business agent for the Plaintiff. In this capacity, I have reviewed numerous newspaper advertisements by public agencies soliciting bids for municipal waste water projects, as well as numerous bids for such projects.

2. I am experienced in and knowledgeable about the type of work performed by members of the Plaintiff.

3. I personally observed that the same type of work was performed by contractors of Defendant City of Canton at the Canton Waste Water Treatment Project at issue in this case, that typically is performed by employees represented by the Plaintiff.

4. I have reviewed the newspaper advertisement submitted by Defendant City of Canton in support of its motion for summary judgment, as well as the requirements of Section 153.50 of the Ohio Revised Code. Based upon my experience and knowledge, it is my opinion that the newspaper advertisement does not meet the requirements of Section 153.50 of the Ohio Revised Code and that

the mechanical labor regarding piping and/or the major or complex piping related work, that is typically performed by Plaintiff's members, was not required by the advertisement to be submitted by a separate and distinct proposal, but instead was included within the general construction solicitation for bid.

5. I am over the age of eighteen (18) years and have personal knowledge of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

_____
DANIEL FONTE

SWORN TO before me and SUBSCRIBED in my presence, this 22nd day of April, 1991.

_____
NOTARY PUBLIC

Dated: November 22, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	SECOND AFFIDAVIT OF DANIEL FONTE
Defendants	:	

I, DANIEL FONTE, being first duly sworn accordingly to law, depose and state as follows:

1. This affidavit is a supplement to the earlier affidavit I have given in this case. By this affidavit, I reaffirm my previous statements from my earlier affidavit.

2. I was present during the deposition of Theresa Fitchpatrick which

was taken in this case and which I understand is now being filed with this Court. I dispute certain factual contentions made by Ms. Fitchpatrick including, but not limited to, the following enumerated instances.

3. Prior to Ms. Fitchpatrick's deposition, neigher I, nor to the best of my knowledge Plaintiff Local 94, ever received a request from the Ohio Department of Industrial Relations (hereinafter the "ODIR") for information to establish that members of the Plaintiff Local performed the plumbing and pipefitting work on waste water treatment plants, though I have verbally provided such information to ODIR investigators in the past at times before July 13, 1990.

4. Prior to the date of Ms. Fitchpatrick's deposition, neither I, nor to the best of my knowledge anyone else representing the Plaintiff, ever received a written or verbal determinatin on my prevailing wage complaint involving the Canton waste water project at issue in this case (hereinafter the "Complaint"), or the reiteration of that Complaint filed on the Plaintiff's behalf with ODIR by our Attorney Randall Vehar, indicating that a final determination had been made or that our complaints were without merit.

5. During her deposition, Ms. Fitchpatrick stated that she told me of her final decision on my Complaint when she spoke at a Plumbers and Pipefitters convention in Toledo, Ohio. While Ms. Fitchpatrick did speak to a Plumbers and

Pipefitters convention in Toledo, Ohio, on July 13, 1990, she did not give me a final determination on the merits of my Complaint.

6. To the extent that I received any response from ODIR on my Complaint regarding the Project at issue in this case, I received a copy of a 1969 decision by the National Labor Relations Board involving entities who are not parties to this case. While I continually have taken the position that the proceedings that the Plaintiff initiated before ODIR are not work jurisdictional dispute proceedings since the Plaintiff is not and/or was not attempting to obtain the work for its members through this prevailing wage rate proceeding, but merely was attempting to insure, as an interested party, that the

appropriate prevailing wage rates were paid to whichever employees, in fact, performed plumbing and pipefitting work, it has been my impression that ODIR did not want to decide the prevailing wage question because of its mistaken opinion that this was a work jurisdictional dispute.

7. Based upon my knowledge of the industry within Stark County, Ohio, I do not believe that Defendant Kokosing performed "mechanical" plumbing and pipefitting work on a waste water treatment plant within Stark County, Ohio, prior to or during the construction on the Canton Waste Water Treatment Plant in 1987-1988.

8. I am over the age of eighteen (18) and have personal knowledge of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

_____
DANIEL FONTE

SWORN TO before me and SUBSCRIBED in my presence, this 22nd day of November, 1991.

_____
NOTARY PUBLIC

Dated: December 18, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	THIRD AFFIDAVIT OF DANIEL J. FONTE
Defendants	:	

I, Daniel J. Fonte, being first duly sworn according to law, depose and state as follows:

1. This affidavit supplements my first and second affidavits previously filed in the above-captioned case regarding the Canton Waste Water Treatment Project at issue in this case (hereinafter the "Project").

2. Workers, who are and/or were members of the Plaintiff during relevant times, performed plumbing or pipefitting work at the following waste water treatment plants during the approximate time periods indicated: Alliance Waste Water Treatment Plant, Alliance, Ohio (August 16, 1983, through March 1, 1985); Orrville Waste Water Treatment Plant, Orrville, Ohio (November 23, 1987, through February 10, 1989); Massillon Waste Water Treatment Plant, Massillon, Ohio (November, 1990, through March, 1991); Navarre Waste Water Treatment Plant, Navarre, Ohio (July 16, 1987, through May 5, 1988).

3. Workers, who were or are represented by the Plaintiff, performed process piping work at the projects listed in the previous paragraph as well

as at other construction projects within Stark County, Ohio, during relevant times. The process piping work at these other waste water treatment plants included the same or similar type of work that I saw Laborers perform at the Project, and/or which I have learned during the depositions in this case (all of which I attended) was performed by Laborers at the Project. (I have included the reference to the Orrville project to show that workers represented by the Plaintiff have performed process piping in an adjacent county). This process piping work was performed under and pursuant to the Stark Association of Plumbing, Heating and Cooling Contractors, Inc. and United Association of Plumbers, Pipefitters Refrigeration, Local Union No. 94 (the Plaintiff) labor

agreement dated and effective from May 1, 1986, through April 30, 1989, a true and accurate copy of which already is included in this case as part of Plaintiff's Appendix "5" (hereinafter the "Pipefitters' Agreement").

4. Under the Pipefitters' Agreement with Soehnlen Piping Company in effect during the time that the Canton Waste Water Treatment Plant Project was being performed in 1987-1988, if Soehnlen had performed the mechanical plumbing or pipefitting work, including the process piping work, Soehnlen could not have used more than one apprentice for three (3) journeyman on that Project.

5. Based on my knowledge of the industry, the Laborers' Union does not have an apprenticeship program for plumbing or pipefitting workers.

6. Based upon my review of the payroll records submitted by Kokosing Construction Company during discovery in the above-captioned case regarding the Canton Waste Water Treatment Project, it does not appear that Kokosing utilized any apprentices to perform plumbing or pipefitting work on the Canton Waste Water Treatment Project.

7. Based upon my knowledge of the industry and numerous conversations with various contractors who bid on various construction projects, it is my understanding that contractors do not normally utilize an apprenticeship rate when calculating their projected costs when placing bids for construction projects. Instead, contractors normally assume that they will be paying journeymen's wages since it is not always

clear how many, if any, apprentices will be available when construction actually commences, nor is it clear at the time that bids are being placed the length of time that avoidable apprentices have been apprentices. The length of time that a person has been an apprentice may affect the wage rate that he/she must be paid under the Pipefitters' Agreement.

8. Since the payroll records submitted during discovery by Defendant Kokosing in this case, as well as the Laborers' Union collective bargaining agreement submitted, both suggest that the Laborers do not pay apprenticeship rates and/or did not have apprentices for purposes of performing process piping work at the Canton Waste Water Treatment Project, it is the Plaintiff's position that the possibility, that Pipefitter

apprentices might have performed some of the work at the Project if Soehlen had been awarded the work at issue, is irrelevant. Since no Laborers' apprentices performed work at the Project, then no prevailing rates for apprentices would have to be paid and the Pipefitters' apprenticeship rate would have no applicability. Only the Pipefitters' journeymen rates, which during relevant times were higher for both hourly wages and fringe benefits than the Laborers' hourly and fringe benefits rates, would be applicable for prevailing wage rate purposes.

9. Some of the members of Plaintiff, who would have been referred to perform process piping work for Soehlen Piping Company, if Soehlen had

received the bid on the Project, resided in the City of Canton.

10. I am over the age of eighteen (18) and have personal knowledge of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

DANIEL J. FONTE

SWORN TO before me and SUBSCRIBED in my presence, this 18th day of December, 1991.

NOTARY PUBLIC

OHIO REVISED CODE

Section 153.50 Separate bids for work and materials.

An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, for each separate and distinct trade or kind of mechanical

OHIO REVISED CODE SECTION 153.50 CONT.

labor, employment, or business entering into the improvement.

OHIO REVISED CODE

Section 153.51. Contract may not be awarded for entire work.

When more than one trade or kind of mechanical labor, employment, or business is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate.

OHIO REVISED CODE

Section 153.52. Each contract shall be for only one class of labor or material, exceptions.

The contract for doing the work belonging to each separate trade or kind of mechanical labor, employment, or business, or for the furnishing of materials therefore, or both, shall be awarded by the officer, board, or other authority referred to in section 153.50 of the Revised Code, in its discretion, to the lowest responsive and responsible separate bidder therefore, in accordance with section 9.312 [9.31.2] of the Revised Code in the case of any officer, board, or other authority of the state or any public institution belonging thereto, and to the lowest and best separate

OHIO REVISED CODE SECTION 153.52 CONT.

bidder in the case of a county, township, municipal corporation, or school district, or any public institution belonging thereto, and shall be made directly with him or them in the manner and upon the terms, conditions, and limitations as to giving bond or bid guaranties as prescribed by law unless it is let as a whole, or to bidders for more than one kind of work or materials. Sections 153.50 to 153.52 of the Revised Code do not apply to the erection of buildings and other structures which cost less than ten thousand dollars, except as provided in sections 153.02 and 153.03 of the Revised Code.

OHIO REVISED CODE

Section 4115.03. Definitions.

As used in sections 4115.03 to 4115.16 of the Revised Code:

(A) "Public authority" means any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions maded in whole or in part from public funds.

(B) "Construction" means any construction, reconstruction,

OHIO REVISED CODE SECTION 4115.03 CONT.

improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement the total overall project cost of which is fairly estimated to be more than four thousand dollars and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.

(C) "Public improvement" includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by

OHIO REVISED CODE SECTION 4115.03 CONT.

any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof. When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority, shall be a "public improvement" as defined herein.

(D) "Locality" means the county wherein the physical work upon any public improvement is being performed.

(E) "Prevailing wages" means the sum of the following:

OHIO REVISED CODE SECTION 4115.03 CONT.

(1) The basic hourly rate of pay;

(2) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program;

(3) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing the following fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in

OHIO REVISED CODE SECTION 4115.03 CONT.

writing to the laborers and mechanics affected:

(a) Medical or hospital care or insurance to provide such;

(b) Pensions on retirement or death or insurance to provide such;

(c) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapters 4121. and 4123. of the Revised Code;

OHIO REVISED CODE SECTION 4115.03 CONT.

(d) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;

(e) Life insurance;

(f) Disability and sickness insurance;

(g) Accident insurance;

(h) Vacation and holiday pay;

(i) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the laborers and mechanics affected;

(j) Other bona fide fringe benefits;

OHIO REVISED CODE SECTION 4115.03 CONT.

None of the benefits enumerated in division (E)(3) of this section may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any of such benefits.

(F) "Interested party," with respect to a particular public improvement, means:

(1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

(2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;

OHIO REVISED CODE SECTION 4115.03 CONT.

(3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;

(4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section.

OHIO REVISED CODE

Section 4115.05. Locally prevailing wage rates to determine minimum contract wage.

The prevailing rate of wages to be paid for a legal day's work, as prescribed in section 4115.04 of the Revised Code, to laborers, workmen, or mechanics upon public works shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the

OHIO REVISED CODE SECTION 4115.05 CONT.

trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.

Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less at any time during the life of a contract for the public work than the prevailing rate of wages then payable for such labor in the locality where the public work is being performed, under or as a result of collective bargaining agreements or understandings between employers and bona fide organizations of labor in force at the date the contract for the public work, requiring the employment of serving laborers, helpers, assistants, or apprentices, was made, and

OHIO REVISED CODE SECTION 4115.05 CONT.

collective bargaining agreements or understandings successor thereto.

Apprentices will be permitted to work only under a bona fide apprenticeship program if such program exists and is registered with the Ohio apprenticeship council.

The allowable ratio of apprentices to skilled workers permitted to work shall not be greater than the ratio allowed the contractor or subcontrator in the collective bargaining agreement or understanding referred to in this section under which the work is being performed.

In event there is no such collective bargaining agreement or understanding in the immediate locality, then the prevailing rates of wages in the nearest

OHIO REVISED CODE SECTION 4115.05 CONT.

locality in which such collective bargaining agreements or understandings are in effect shall be the prevailing rate of wages, in such locality, for the various occupations covered by sections 4115.03 to 4115.16 of the Revised Code.

The prevailing rate of wages to be paid for a legal day's work, to laborers, workmen, or mechanics, upon any material to be used in or in connection with a public work, shall not be less than the prevailing rate of wages payable for a day's work in the same trade or occupation in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used.

OHIO REVISED CODE SECTION 4115.05 CONT.

Every contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work shall be paid the prevailing rate of wages provided in this section.

No contractor or subcontractor under a contract for a public work shall sublet any of the work covered by such contract unless specifically authorized to do so by the contract.

Where contracts are not awarded or construction undertaken within ninety days from the date of the establishment of the prevailing rate of wages, there shall be a redetermination of the prevailing rate of wages before the

OHIO REVISED CODE SECTION 4115.05 CONT.

contract is awarded. Upon receipt from the director of industrial relations of a notice of a change in prevailing wage rates, a public authority shall, within seven working days after receipt thereof, notify all affected contractors and subcontractors with whom the public authority has contracts for a public improvement of the changes and require the contractors to make the necessary adjustments in the prevailing wage rates.

If the director of industrial relations determines that a contractor or subcontractor has violated sections 4115.03 to 4115.16 of the Revised Code because the public authority has not notified the contractor or subcontractor as required by this section, the public

OHIO REVISED CODE SECTION 4115.05 CONT.

authority is liable for any back wages, fines, damages, court costs, and attorneys fees associated with the enforcement of said sections by the director for the period of time running until the public authority gives the required notice to the contractor or subcontractor.

On the occasion of the first pay date under a contract, the contractor or subcontractor shall furnish each employee not covered by a collective bargaining agreement or understanding between employers and bona fide organizations of labor with individual written notification of the job classification to which the employee is assigned, the prevailing wage determined to be

OHIO REVISED CODE SECTION 4115.05 CONT.

applicable to that classification, separated into the hourly rate of pay and the fringe payments, and the identity of the prevailing wage coordinator appointed by the public authority. The contractor or subcontractor shall furnish the same notification to each affected employee every time the job classification of the employee is changed.

REVISED CODE

Section 4115.10. Prohibitions.

(A) No person, firm, corporation, or public authority that constructs a public improvement with its own forces the total overall project cost of which is fairly estimated to be more than four thousand dollars shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority

OHIO REVISED CODE SECTION 4115.10 CONT.

that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference. The employee may file suit for recovery within sixty days of the director of industrial relations' determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable

OHIO REVISED CODE SECTION 4115.10 CONT.

thereto may file a complaint in writing with the department of industrial relations upon a form furnished by the department. At the written request of any employee paid less than the prevailing rate of wages applicable, the director shall take an assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the director determines there is a

OHIO REVISED CODE SECTION 4115.10 CONT.

violation of sections 4115.03 to 4115.16 of the Revised Code and sixty days have elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the director take an assignment of a wage claim pursuant to division (B) of this section.

The director shall bring any legal action necessary to collect any amounts owed to employees and in addition thereto as a penalty an amount equal to the amounts so collected. The director shall pay over to the affected employees the amounts collected including the penalty

OHIO REVISED CODE SECTION 4115.10 CONT.

amounts collected. In any action in which the director prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where workmen are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for himself or any other person, shall request, demand, or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or

OHIO REVISED CODE SECTION 4115.10 CONT.

understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(E) The department of industrial relations shall enforce sections 4115.03 to 4115.16 of the Revised Code.

OHIO REVISED CODE

Section 4115.16. Complaints of violations; action upon.

(A) An interested party may file a complaint with the director of industrial relations alleging a violation of sections 4115.03 to 4115.16 of the Revised Code. The director, upon receipt of a complaint, shall investigate pursuant to section 4115.13 of the Revised Code. If the director determines that no violation has occurred, the interested party may appeal the decision to the court of common pleas of the county where the violation is alleged to have occurred.

(B) If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested

OHIO REVISED CODE SECTION 4115.16 CONT.

party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director. Contemporaneous with service of the complaint, the interested party shall deliver a copy of the complaint to the director. Upon receipt thereof, the director shall cease investigating or otherwise acting upon the complaint filed with him pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has

OHIO REVISED CODE SECTION 4115.16 CONT.

occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director. The court may order the director to take such action as will prevent further violation and afford to injured persons the remedies specified under sections 4115.03 to 4115.16 of the Revised Code. Upon receipt of any order of the court pursuant to this section, the director shall undertake enforcement action without further investigation or hearings.

OHIO REVISED CODE SECTION 4115.16 CONT.

(C) The director shall make available to the parties to any appeal or action pursuant to this section all files, documents, affidavits, or other information in the director's possession that pertains to the matter. The rules generally applicable to civil actions in the courts of this state shall govern all appeals or actions under this section. Any determination of a court under this section is subject to appellate review.

(D) Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and court costs to the prevailing party. In the event the court finds that no violation has occurred, the court may

OHIO REVISED CODE SECTION 4115.16 CONT.

award court costs and attorney fees to the prevailing party, other than to the department of industrial relations or the public authority, where the court finds the action brought was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

No. 92-1879

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In The

Supreme Court of the United States

October Term, 1992

PLUMBERS LOCAL UNION NO. 94, AFL-CIO,

Petitioner,

vs.

KOKOSING CONSTRUCTION CO., INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF IN OPPOSITION FOR RESPONDENT KOKOSING CONSTRUCTION CO., INC.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF IN OPPOSITION FOR RESPONDENT KOKOSING CONSTRUCTION CO., INC.

This brief is submitted by Kokosing Construction Company in response to the petition for writ of certiorari as filed by Plumbers Local Union No. 94, AFL-CIO.

COUNTERSTATEMENT OF FACTS

A. The Parties.

Kokosing Construction Company, Inc. ("Kokosing"), one of the respondents, is engaged in the business of general construction contracting. Kokosing typically bids upon and performs construction projects, including municipal waste water treatment plants. Kokosing is a unionized contractor. By virtue of its assignment of bargaining rights to the Labor Relations Division of the Ohio Contractors Association ("OCA-LRD"), Kokosing is signatory to various labor union contracts in Ohio, including contracts with the Operating Engineers Union, Cement Masons Union, and Laborers Union (Walker Affidavit ¶¶ 3 and 4).[1]

Kokosing has no contract with petitioner Plumbers Local Union No. 94 ("Local 94" or the "Plumbers") (*Id.*). The Plumbers Union has its own multi-employer collective bargaining agreement with the Stark County Association of Plumbing, Heating and Cooling Contractors for a geographical area that includes Stark, Wayne and Morrow Counties (Fonte Deposition, Exh. 6).[2]

In the Canton, Ohio area, Kokosing has utilized employees who are members of petitoner Local No. 1015, Laborers Union, pursuant to its agreement negotiated by and between the OCA-LRD with the Laborers' District Council of Ohio (Walker Affidavit ¶4). This contract defines its scope to include "all work in

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1. All references herein to "Walker Affidavit" refer to the affidavit of Kokosing Sr. Vice President Daniel Walker filed by Kokosing Construction Co., Inc. in the Stark County Common Pleas Court, November 21, 1991, in support of its Motion for Summary Judgment.

2. All references herein to "Fonte Deposition" refer to the deposition of Plumbers Local 94 Business Agent John Fonte filed in the Stark County Common Pleas Court on November 21, 1991.

construction of pumping stations, waste and sewage disposal plants, incinerator plants, water treatment plants, filtration plants and solid waste disposal plants" (Agreement at Art. II, ¶II(g), Exh. 1 to Walker Affidavit).

B. The Canton, Ohio Water Pollution Control Center Project.

In May, 1987, the respondent City of Canton, Ohio ("Canton") advertised and solicited bids for the construction of certain improvements to its Water Pollution Control Center (the "Project") (Local 94 App. to Appeal Brief at p. 019).[3] The Project was separated into four contracts for bidding: General; Heating, Ventilating and Air Conditioning; Plumbing; and Electrical (*Id.*). Kokosing was the successful bidder on the General Construction Project, consisting of work that included:

> [C]onverting the existing oxidation ditch system to a new diffused aeration system, including the construction of a new Compressor Building, furnishing and installing new aeration compressors, air filters, diffuser system, piping, valves, dissolved oxygen probes, air meters, materials handling equipment, and other appurtenant work, including the removal of existing oxidation ditch equipment and appurtenances.

(*Id.*).

Kokosing did not submit a bid for the plumbing contract which included "furnishing and installing all drains, vents, piping

3. All references herein to "Local 94 App. to Appeal Brief" refers to the appendix filed by Local 94 in the Fifth Appellate District, Stark County, Ohio in conjunction with its brief on appeal, March 30, 1992.

and other appurtenant work in the new Compressor Building."

C. The Prevailing Wage Requirements Of The Contract.

The contract, as a public work, contained "prevailing wage rate" requirements pursuant to the provisions of Ohio Statutes (Ohio Revised Code, § 4115.03, *et seq.*). Among other things, the contract between Kokosing and Canton contained the following provision:

> [W]ages shall be paid to each employee engaged in the work on the project under this contract at a rate not less than the prevailing rate of wages for the particular trade or occupation in which he is engaged, *nor at a rate less than the minimum listed for his particular trade or occupation in the Wage Determinations made for this project by the Ohio Department of Industrial Relations.*

(Water Pollution Control Center Improvements Contract 17, Instruction to Bidders, Exh. 2 to Walker Affidavit at ¶8) (emphasis added). The Ohio Department of Industrial Relations ("ODIR") wage rate was physically attached to the proposal and made a part of the contract.

In preparing its bid for the Project, Kokosing determined that certain work, such as setting, installing, or fabricating piping, setting compressors and air filters, would be performed by its employees represented by the Laborers' Union. Kokosing assigned work to Laborers Union members in accordance with its past practices, industry practices, the existence of its collective bargaining relationships and efficiency of operations (Walker Affidavit ¶6).

As it had in the past, Kokosing calculated its labor costs initially based upon the prevailing rates determined for the Laborers Union as set forth in the ODIR's wage determination schedule attached to the contract (Walker Affidavit ¶7). The prevailing wage schedule contained wage rates for Laborers for the waste water treatment plant. Kokosing had performed work on various other water pollution control centers in recent years and, in each instance, had performed the work with its employees who were members of the Laborers Union, and at the Laborers' Union wage rate as set forth in the prevailing wage schedules in the contracts for those projects.

D. January 1988: The Plumbers Complain About The Wage Being Paid By Kokosing And Commence An Action Against ODIR.

On January 29, 1988, Local 94's Business Agent, Daniel Fonte, filed a "Prevailing Wage Complaint" with the ODIR which also enforces Ohio's prevailing wage laws. Therein, Mr. Fonte alleged that Kokosing was obligated to use "the Local 94 Union rate" and not "Laborers' Union" rate for the process piping portion of the water treatment plant (Fonte Deposition, Exh. 4). Fonte has unsuccessfully filed other complaints with the ODIR in the past in the Canton and Wooster, Ohio areas, where the Company also used members of the Laborers Union to do similar piping work, and paid the Laborers' wage rate (Fonte Deposition p. 068).

Once again, unsuccessfull in this regard, Local 94 filed an action for declaratory and injunctive relief in the Ohio Court of Claims in August of 1988, seeking to compel the ODIR to determine that the work at issue in this lawsuit should be paid for at the "Plumbers' Union rate." *Plumbers Local Union No. 94 v. Ohio Dept. of Industrial Relations*, Case No. 88-07618 (Ct. Cl. 1988) (Kokosing App. to Appeal Brief at Tab 9).[4] This action was

4. All references herein to "Kokosing App. to Appeal Brief" refers to the (Cont'd)

dismissed, the court of claims finding that it was without authority to grant mandamus. The court held that Local 94's remedy lay either in an administrative appeal or in a writ of mandamus in a court having jurisdiction over such actions. That decision was upheld, on appeal, based upon lack of jurisdiction of the court of claims to issue a writ of mandamus. *Plumbers Local Union No. 94 v. Ohio Dept. of Industrial Relations*, Case No. 88AP-1047 (Franklin Cty. 1990) (Pet. App. at 1-7).

E. 1989: The Plumbers File, Once Again, A Prevailing Wage Complaint.

Local 94 did not file a writ of mandamus against ODIR in a court having jurisdiction. Instead, Local 94 filed its lawsuit in this matter against Kokosing and the City of Canton. The Laborers Union Local 1015 was joined as an additional party. This suit was filed following the same prevailing wage complaint being lodged with ODIR complaining about the prevailing rate schedule at Canton. As the Plumbers' Union counsel stated:

> However, the Department failed to utilize the Plumbers' labor agreement to set the prevailing wage rates, but apparently utilized the Laborers' labor contract.

(Fonte Deposition, Exh. 7).

The Plumbers maintained that Kokosing should have paid its employees, who were members of the Laborers Union, the so-called "Plumbers' Rate" because the members of the Laborers Union were allegedly performing "Plumbers' work." (Pet. App. at 46-59).

(Cont'd)
appendix filed by Kokosing in the Fifth Appellate District, Stark County, Ohio in conjunction with its brief on appeal, April 23, 1992.

The complaint was subsequently amended to include an allegation against Canton under a new theory, specifically, a violation of Section 153.50 of the Ohio Revised Code, stating that the City of Canton violated a statutory obligation on requiring "separate and distinct proposals" to be made for furnishing work for "each separate and distinct trade or kind of mechanical labor." Only paragraph eighteen of the amended complaint now included Kokosing within its allegations, alleging that the Plumbers had filed, with ODIR, allegations of violations by Kokosing of prevailing wage laws (Pet. App. at 55-56).

F. The Decision Of The Trial Court.

Following the filing of cross motions for summary judgment, the trial court denied the motion of Local 94 and granted motions for summary judgment as filed by Kokosing, the City of Canton, and the Laborers.

The court found that the project had been completed in 1988 and the action was moot, with Local 94 only wanting "precedent in the future" (Pet. App. at 13). The court found that there was no material dispute surrounding the prevailing wage claim because the Laborers' Union rate was indeed paid by the contractor, as set out in the prevailing rate schedule. However, the court found that whether the rate should have been the Plumbers' or the Laborers' was an issue of union work jurisdiction preempted by the National Labor Relations Act (Pet. App. at 10).

G. The Decision Of The Court Of Appeals.

The court of appeals affirmed the trial court's decision. As it set out, summarizing the Assignment of Errors:

> Thus, appellant's claim that although Kokosing paid its workers the prevailing Laborers' wage, this nonetheless violated the

> prevailing rate statutes because the workers who performed these jobs should have been paid the higher Plumbers' prevailing rate. Without this basic premise, all of appellant's arguments fall.

(App. of Local 94 at pp. 23-24). The appeals court found that the issue of whether work was to be performed by the Laborers or the Plumbers was preempted by the National Labor Relations Act. As a result, it also rejected the contention of petitioner involving "separate bids" because "Appellant simply challenges how the work was separated and categorized" (Pet. App. at 27-28).

H. The Plumbers Local Requests The Lower Court To Certify The Case In The Supreme Court.

As the brief of Plumbers Local 94 points out, the case was attempted to be filed in the Supreme Court of Ohio in two different formats. The first of those formats was pursuant to a "certification due to conflict" between this case and another court of appeals decision. That is Case No. 92-2443. The case for which the petition has been filed is 92-2375 which requested the Supreme Court to certify the record over issues that included those before this Court in the petition.[5] The motion to certify in Case No. 92-2375 was overruled on February 10, 1993 (Pet. App. at pp. 43-44).

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5. The Supreme Court of Ohio has appellate jurisdiction in cases which it determines arise under the United States or Ohio Constitutions or are of *compelling* public or great general interest. Ohio Constitution, Article IV, Section 2.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS PROPERLY RULED THAT THE ISSUE OF WHICH OF TWO UNIONS COMPETING FOR THE SAME CLASS OF WORK DID NOT INVOLVE PREVAILING RATES OF WAGES BUT WAS A MATTER TO RESOLVE PURSUANT TO JURISDICTIONAL PROCEDURES OF THE NATIONAL LABOR RELATIONS ACT.

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const., Art. VI, Cl. 2. As this Court has ruled on countless occasions, under this Clause, state and local laws that conflict or interfere with federal law must yield to the exercise of congressional authority and are deemed to be preempted. Federal legislation supersedes state law where Congress has expressly, or by necessary implication, indicated an intent to displace all state laws on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In addition, state laws are preempted under the Supremacy Clause to the extent that they actually conflict with federal law, such as when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This past term, this Court had occasion once again to consider preemption in *Mary Gade v. National Solid Wastes Management*

Association, 505 U.S. __, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). As the Court noted, setting forth the general principles:

> Pre-emption may be either expressed or implied and is "compelled whether Congress' " command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." [citing cases]. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption where the scheme of a federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" [citing cases] and conflict pre-emption, where "compliance with both Federal and State regulations is a physical impossibility," [citing cases] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objects of Congress."

The field which is preempted by the Supremacy Clause in this case is based upon labor and management relations, specifically, the National Labor Relations Act ("NLRA"), 29 U.S.C. 151, *et seq*.

The NLRA sets out a comprehensive framework for the federal regulation of labor-management relations and the protection of employee rights. It was passed in order to provide a "coherent basis for . . . delicately structuring the balance of power" among these competing forces, *Amalgamated Assn. of Street, Electric Ry. and Motorcoach Employees v. Lockridge*, 403 U.S. 274, 286 (1971), and reflects a national policy favoring "the practice and procedure of collective bargaining" and the protection of the exercise "by workers of full freedom of association, self-organization, and designation of representatives of their own

choosing." 29 U.S.C. § 151. To this end, Section 7 of the Act, 29 U.S.C. § 157, grants employees the right to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8 of the Act, 29 U.S.C. § 158, designates certain activities of employers and unions to be unlawful unfair labor practices. It makes it unlawful for employers and unions to interfere with the rights of employees and prohibits each from engaging in certain conduct in their relations with each other in matters relating to collective bargaining, strikes, picketing and the like.

The issue of preemption with respect to the issue in the within case was established by the Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), when this Court held that the NLRA preempts state and federal court jurisdiction to remedy conduct that is "arguably protected or prohibited" by the NLRA. This Court more recently summarized *Garmon* preemption as follows:

> *Garmon* preemption "prohibits states regulating activity that the NLRA protects, prohibits or *arguably protects* or prohibits." [citation]. *Garmon* preemption is designed to preclude state interference with the NLRB's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.

Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613 (1986) (emphasis added). *See also, Amalgamated Assn. of Street, Electric Ry. and Motorcoach Employees v. Lockridge, supra*, 403 U.S. 274, 276 (1971) (the NLRA "pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act."); *Allis Chalmers Corp. v. Lueck*, 471 U.S.

202, 208 (1985) (the question is whether a "certain state action is preempted . . .").

The National Labor Relations Act, then, regulates the right of employers as to how they bargain and do not bargain with employees. Further, it provides for deciding issues of jurisdiction between competing unions and resolving them unless all of the parties (*i.e.*, both unions and the employers) have a voluntary method to resolve them. Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D); *NLRB v. Radio and Television Broadcast Engineers Union Local 1212 (Columbia Broadcasting Systems)*, 364 U.S. 573 (1961).

Assuredly, Local 94 does not contest any of the foregoing principles. What the Plumbers attempt to show is that the lower courts improperly found there was no preemption because in their view, there is no jurisdictional issue between competing union. That, of course, is not an untypical effort. But, as this Court has emphasized, labor preemption is concerned with limiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. *Local 100, United States Journeyman and Pipefitters v. Borden*, 373 U.S. 690, 698 (1963).

The decisions of the lower courts in this matter did not deal with preemption of the Ohio prevailing wage statute. To the contrary, they simply ruled that the function of the industrial relations statute was not to resolve a dispute between two competing unions performing the same work.

Ohio Revised Code, at § 4115.03, *et seq.*, created what is known as the Ohio Prevailing Wage Law. The provisions of these sections set forth requirements applicable to wages and hours on public works projects. Ohio Revised Code § 4115.04[6] provides

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6. Section 4115.04. Determination of prevailing wage rate.

(Cont'd)

that every public authority authorized to contract for a public improvement shall have the Department of Industrial Relations determine the prevailing rate of wages for the class of work called for by the improvement.

The procedure by which prevailing rates of wages are to be determined is set out at § 4115.05. It states that this wage shall:

> [N]ot be less at any time during the life of a

(Cont'd)

> Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have the department of industrial relations determine the prevailing rates of wages of mechanics and laborers in accordance with Section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed. Such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. A copy of the bidding blank shall be filed with the department of industrial relations before such contract is awarded. A minimum rate of wages for common laborers, on work coming under the jurisdiction of the department of transportation, shall be fixed in each county of the state by said department of transportation, in accordance with Section 4115.05 of the Revised Code. Sections 4115.03 to 4115.16 of the Revised Code do not apply to public improvements in any case where the federal government or any of its agencies furnishes by or grant all or any part of the funds used in constructing such improvements, provided the federal government or any of its agencies prescribes predetermined minimum wages to be paid to mechanics and laborers employed in the construction of such improvements.

> contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining *agreements* or *understandings*, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.

(emphasis added).

In this case, the Ohio Department of Industrial Relations was asked by the City of Canton to issue wage determinations for its waste water treatment plant. It did so, and certified rates that included, *inter alia*, the rates of the Laborers' Union for "sewer, water works, and utility construction" for a twelve county area in Ohio that included Stark County, where Canton is located.

Local 94 contends that the Department of Industrial Relations has to make a ruling in its favor over the Laborers Union. The Department, however, performed its statutory duty, setting forth the wage rates for the understandings in the area.

As conceded by the Plumbers, Kokosing as well as other contractors have used members of the Laborers Union to perform the exact type of work at issue in Canton's Waste Water Treatment Plant. Contractors have done so throughout the state for the past twenty years.

And, following the filing of the complaint by Local 94 with ODIR, a meeting was held with the Plumbers and other parties in which ODIR concluded that the matter was jurisdictional in nature and outside of ODIR's authority, stating:

> *We as a division cannot enterprise any action where there are jurisdictional labor disputes.*

(March 18, 1988 Memorandum from Hallie Brotherton, Asst. Chief, Division of Prevailing Wage, Minimum Wage and Minors to Geneva Burga, Inspector) (emphasis supplied).

As Margaret Omohundro of the ODIR stated, the Department would:

> [L]ook at the collective bargaining agreements and determine the class of work called for by the public improvement and if there is a dispute as to which local performs it, we would look to the two collective bargaining agreements as well as the dictionary of occupational titles, and if it was determined that both of these crafts did this type of work . . . then we would conclude that's a jurisdictional dispute between the two locals.

(Omohundro Deposition at p. 038).[7] If the dispute is jurisdictional, the Department removes itself from the dispute (Omohundro Deposition at pp. 038-040).

Local 94 makes much of the fact that the Laborers have not performed this specific work in Stark County Ohio as opposed to other areas of work within the geographical jurisdiction of Plumbers Local 94. Be that as it may, it is not the function of the ODIR to have to go into each county of the state to determine a wage rate only if it is actually performed by that craft union in that

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7. All references to "Omohundro Deposition" refer to the deposition of Margaret Omohundro filed in the Stark County Common Pleas Court on November 21, 1991.

county. To the contrary, § 4115.05, *supra*, p. 11, states that the Department is to base its wage rates on the collective bargaining agreements in force at the date the contract for the public work related to the trade or occupation was made. In this case, the Department made a determination that the Laborers' Union contract, dealing with construction of sewage treatment plants, has a wage rate in effect for Stark as well as the counties surrounding Stark.

In sum, nowhere in the Ohio statute is the ODIR to determine disputes between competing unions that claim the same work. Of course, that is what is presented. As Plumbers Local No. 94 business agent was asked:

> Q. . . . Do you ever get into disputes between two different trades as to who's going to perform the work?
>
> A. Yeah, that happens all the time.

(Fonte Deposition at p. 078). He was asked if two unions, such as Sheet Metal Workers and Iron Workers, claimed the same type of work such as "roofs on metal buildings":

> A. I assume they do because they have a dispute.

(Fonte Deposition at p. 078). Should ODIR then certify one of those two craft rates over the other. Fonte was asked:

> Q. Do you know if the Department [of Industrial Relations] has ever had occasion to certify an Ironworker's rate over a Sheet Metal Worker on that kind of issue?
>
> A. Not to my knowledge.

(Fonte Deposition at p. 078). Yet, the Plumbers are contending here exactly that: ODIR should certify one union's rates when two have performed the work.

The function of the Department was met in this case. It certified the rate then payable in the same trade or occupation under collective bargaining agreements or understandings in the locality where such public work was being performed. The Department has made a determination that Laborers perform this work in 19 counties including Stark County, Ohio.

It is not a question of federal preemption of a statute, it is a question of the state government not interfering with that function performed by the federal government.[8]

II.

THE ISSUES SURROUNDING THE SEPARATE BID STATUTES OF OHIO ARE MOOT, THE PROJECT HAVING BEEN COMPLETED.

As set forth in the Union's brief, the State of Ohio has a "separate bid" statute.[9] This statute was followed by the City of

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8. Federal preemption has been found on prevailing rate cases in other situations, *see, e.g., F.H.M. Constructors Inc. v. Village of Canton Housing Authority*, __ F. Supp. __ (1993 W.L. 23587) (1 Wage and Hour Cas. 2d) (BNA) 398 (N.D.N.Y. February 2, 1993) (U.S. Housing Act preempts New York State labor code provisions which, if implemented, will require higher prevailing wages); *Commissioner of Labor v. Boston Housing Authority*, 345 Mass. 406, 188 N.E. 2d 150 (1963) (application of state wage rates to federally funded housing projects would be an impermissible intrusion into federal areas which have been preempted).

9. Section 153.51. Contract may not be awarded for entire work.

(Cont'd)

Canton. There was a separate contract for the "Plumbing" portion of the work. But what Plumbers Local 94 disputes is that the work done by the Laborers Union members should have been within the plumbing portion. The court of appeals correctly noted that this was part and parcel of the issue of its work jurisdiction dispute with the Laborers. In any event, as the trial court found, since the project has been completed, an issue of which craft should receive which portion of the work by bidding is plainly moot under Ohio law. *National Electrical Contractors Association v. City of Painesville*, 36 Ohio St. 60 (1973) (plaintiff's failure to protest or complain about bidding procedures or seeking to enjoin the startup of or continuance of the project rendered plaintiff's claims moot). Since events have "irrevocably eradicated the effects of the alleged violation" and there is "no reasonable expectation" that the alleged violation will occur, such an action is obviously moot. *City of Los Angeles v. Davis*, 44 U.S. 625, 631 (1979).

(Cont'd)

> When more than one trade or kind of mechanical labor, employment, or business is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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(4)

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Case No. 92-1879

In The

Supreme Court of the United States

October Term, 1992

PLUMBERS LOCAL UNION NO. 94, AFL-CIO
Petitioner

vs.

KOKOSING CONSTRUCTION CO., ET AL.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT CANTON, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Respondent City of Canton agrees in part with the Statement of the Case as presented by Petitioner except as to the following issues:

Petitioner omits to say that on January 29, 1988, Daniel Fonte, Business Agent of Petitioner Plumbers Local Union No. 94 ("Plumbers" or "Petitioner"), filed a "Prevailing Wage Complaint" with the State of Ohio, Department of Industrial Relations ("DIR") and that Fonte was subsequently advised that an inspector was assigned to investigate the matter. Petitioner has filed other complaints with the DIR in the past, including a complaint regarding Respondent with Kokosing Construction Company's ("Kokosing") use of members of Respondent Laborers' Local 1015 ("Laborers") to do piping work at the Waste Water Treatment Plant in Wooster, Ohio

On August 4, 1988, Petitioner filed a complaint for declaratory and injunctive relief in the Ohio Court of Claims, seeking to compel the DIR to determine that the work at issue in this lawsuit be paid for at the prevailing wage rate for Plumbers, as determined under Ohio Revised Code ("O.R.C") section 4115.05. **Plumbers Local Union No. 94 v. Ohio Dept. of Industrial Relations,** Case No. 88-07618 (Ct. Cl. 1988). This action was dismissed, the Court of Claims finding that it was without authority to grant relief in the form of mandamus, and that Plaintiff's remedy lay, if at all, in either an administrative appeal or in a writ of mandamus in a court having jurisdiction over such actions. The Court of Claims' decision was upheld on appeal. See, **Plumbers Local Union No. 94 v. Ohio Dept of Industrial Relations,** Case No. 88AP-1047 (Franklin Cty. 1990).

With the dismissal of the lawsuit, the Plumbers again filed a complaint over the same issues as raised in its prior complaint. Counsel for the Plumbers, however, stated in its January 25, 1989 correspondence, regarding the merit of the new complaint:

> The Department failed to utilize the Plumbers' labor agreement to set the prevailing wage rates, but apparently utilized the Laborers' labor contract.

Counsel for the Plumbers was advised that a complaint had already been filed in January of 1988. The Plumbers then initiated the instant suit on November 13, 1990.

While the Plumbers' original complaint alleged Kokosing's violation of the prevailing wage laws, the Plumbers' amended complaint, filed on July 26, 1991, set forth a new theory in attempt to recover in this action. The Plumbers now alleged that the City of Canton had a statutory obligation under O.R.C. section 153.50 to require "separate and distinct proposals" to be made for furnishing work for "each separate and distinct trade or kind of labor." The Plumbers were now complaining that the City did not "separately bid the mechanical piping, including the fitting, laying, fabricating or otherwise installing large and/or complex piping for the project."

Petitioner alleges in its Statement of the Case that it was not seeking "assignment of any particular work for its own members." Petition for Certiorari at 11. What Petitioner fails to mention is that this suit is only a continuation of a long-standing battle between the Plumbers and the Laborers as to which union specific work should be allocated. Petitioner hopes that a favorable judgement in the instant case will compel a public authority to award such work to the Plumbers in the future, where it has in the past been awarded to the Laborers.

Petitioner also alleges that Soehnlen Piping Company ("Soehnlen"), one of the Petitioner's signatory contractors and an unsuccessful bidder upon the general construction contract, would have underbid Kokosing on the work in question had the City been required to accept bids with the work categorized as Petitioner suggests. This assertion rests on the Plumbers' contention that the work was improperly

allocated among the contracts, a "work jurisdiction" question, which, as we shall see, is preempted by the National Labor Relations Act ("NLRA"). Soehnlen, like the Plumbers, made no complaints while the bidding was in process, and Soehnlen bid upon the general construction contract as presented and was rejected in favor of Kokosing's lower bid. The contract was to be awarded on the basis of the entire bid, rather than on each particular item. Thus the actual bid prices represented for each particular item are irrelevant. The fact that Soehnlen's bids on certain enumerated items may have been lower than other bidders' (while other items were, indeed, much higher) is only relevant if the contract had been bid in the manner belatedly urged by the Plumbers. This is an issue that could only be resolved under the heading of "work jurisdiction."

Petitioner also maintains that the Laborers had not performed this type of work in the "locality" as defined in O.R.C. section 4115.03(D) (e.g., Stark County), whereas the Plumbers had performed "similar" work on waste water treatment plants elsewhere in Stark County (e.g., Massillon, Alliance, Orrville, and Navarre, Ohio). Petition for Certiorari at 22. However, by the very nature of the Plumbers' trade, they could only have performed "this type" of (not identical) work when it was offered under the heading of "Plumbers' Work." Petitioner inevitably comes back to the preempted work jurisdiction issue. The Laborers have also done similar, even identical, work in the area for many years, in accordance with such traditional work jurisdiction factors as past practice, existence of a bargaining relationship, industry practice and efficiency of operations. These factors led Theresa Fitchpatrick, Chief of the Wage Division of the DIR at the time of the Canton project to conclude after her investigation of the matter,

> ...In my mind I was completely satisfied that the Laborers had been doing the work for the past ten years, the Plumbers and Pipe Fitters had not been doing or could not prove

> to me that they had been doing it, therefore it was very clear that I had to say that...you would need to classify employees as laborers for that type of work.

As such, the Plumbers' argument comes down to a simple claim of miscategorization of the work at issue, a claim preempted by the NLRA and one which this Court should abstain from addressing.

LAW AND ARGUMENT

A. PETITIONER'S PREVAILING WAGE CLAIM IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

Petitioner's case is premised upon the assertion that the installation of process piping is "Plumbers' Work", subjecting the work to the prevailing wages as determined for Plumbers as opposed to Laborers. As the Trial Court correctly found, the Plumbers' claim was not in substance a prevailing wage claim, but rather a work union jurisdiction claim, and as such, preempted by the National Labor Relations Act ("NLRA"). In framing their claims as a prevailing wage issue, Petitioner does no more than thinly disguise a work jurisdiction claim in order to circumvent NLRA preemption.

In determining whether a state law is preempted, the subject matter of the law must first be tied to a federal law covering the same field. **Hines v. Davidowitz,** 312 U.S. 52, 64-68 (1941). Under the Supremacy Clause of the United States Constitution, Federal legislation supersedes state law where Congress indicates an intent to displace all state laws on the same subject. **Rice v. Santa Fe Elevator Corp.,** 331 U.S. 218 (1947). The NLRA was passed in 1935 in order to provide a "coherent basis for . . . delicately structuring the balance of power" among the competing forces of labor-management relations and employee rights. **Amalgamated Assn. of Street Employees v. Lockridge,** 403 U.S. 274, 286 (1971).

Under Ohio's prevailing wage law, "(t)he prevailing rate of wages to be paid for a legal day's work . . . shall not be less . . . than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings . . ." O.R.C. sec. 4115.05 (emphasis added). Thus, the Ohio Department of Industrial Relations ("DIR") was only obligated to protect the prevailing

rate structure within the locality as reflected in the applicable collective bargaining agreements. The DIR was not required to, and did not, concern itself with the competing claims for work by different trades. Absent contractual means of resolving such disputes, Congress has vested the National Labor Relations Board with the exclusive authority and obligation to resolve competing claims to work. **NLRB v. Radio & Television Broadcast Engineers Union Local 1212 (Columbia Broadcasting System),** 364 U.S. 573 (1961). Thus, such claims, under whatever label they are presented, are subject to analysis under the NLRA only. Indeed, the NLRB has addressed such disputes in the past and has refused to tolerate attempts at misapplication of state prevailing wage laws. The NLRB found that a prevailing wage suit filed by Iron Workers in Nevada alleging that a contractor was in violation of the state prevailing wage law by "use of non-skilled labor. . ." was no more than a "weapon in a jurisdictional dispute." **Iron Workers Local 118 (Clark & Sullivan Contractors),** 305 NLRB No. 34 (1991). The Union was ordered to cease and desist from such conduct.

When the NLRB has addressed issues such as Petitioner's under the appropriate categorization of work jurisdiction disputes, it has consistently held that the work claimed by the Plumbers is properly classified as "Laborers' Work." See, e.g., **R.W. Wander, Inc.,** 176 NLRB 935 (1969) (NLRB awards work of unloading and laying of pipes at water treatment plant to Laborers rather than Plumbers); **The Ashton Co., Inc.** 256 NLRB 1022 (1981) (NLRB awards work of installing process piping to Laborers rather than Plumbers).

Thus, based upon the true nature of Petitioner's claim, the construction of O.R.C. sec. 4115.05, the fundamental purposes of the NLRB and the Ohio DIR, and the prior holdings of the NLRB itself, it is obvious that Petitioner's "prevailing wage" claim is in reality a "work jurisdiction" dispute, preempted by the NLRA. As such, Respondent City of Canton respectfully requests that the petition for writ of certiorari be denied.

B. PETITIONER'S O.R.C. SECTION 153.50 CLAIM AGAINST THE CITY OF CANTON IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT AND IS MOOT.

Ohio's "Separate Bid" law states that a public authority accepting bids for improvements upon public utilities "shall require separate and distinct proposals to be made for . . . doing such work . . . for each separate and distinct trade or kind of mechanical labor . . . entering into the improvement." O.R.C. sec. 153.50. Petitioner alleges that the City of Canton violated O.R.C. 153.50 by including the disputed work in the "general construction" portion of its proposal rather than in the "plumbing installation" portion. Petitioner's argument is, in effect, not that the City did not require separate bids for the work, but rather that the work was improperly separated and categorized. As with the Petitioner's "prevailing wage" argument, this claim amounts to no more than an attempt to disguise a "work jurisdiction" claim. As the Stark County Court of Common Pleas correctly found, and the Court of Appeals of Ohio (5th Appellate District) affirmed, Petitioner's issues are not properly brought under O.R.C. sections 4115 and 153 and are preempted by the National Labor Relations Act.

In any event, Petitioner's section 153 dispute in regard to the bidding procedures employed by the City of Canton is moot. On March 30, 1987, the City advertised for bids for a general construction contract at the Canton Wastewater Treatment Plant. The contract with Kokosing was entered into on or about May 27, 1987. Petitioner made no protest or complaint about the bidding procedures implemented by the City at the time the bids were being solicited, nor did Petitioner seek to enjoin performance of work after the contract had been awarded. Petitioner did not file a complaint with the Ohio Director of Industrial Relations until on or about January 13, 1988, nor did Petitioner file the instant

suit until November 13, 1990. On a similar complaint, the Supreme Court of Ohio found that allegations that "bidding procedures used by the city for (a) water treatment project were illegal, as a violation of R.C. 153.50 and 153.51" were moot:

> "At the time bids were submitted . . . appellants made no protest or complaint about the bidding procedures. They did nothing until after a contract had been awarded . . . No motion has been made by appellants to forestall the start or continuation of the project. Under the posture of this case, therefore, the disputed issues are moot."

National Electric Contractors Association v. City of Painesville, 36 O.S.2d 60, 61, 303 N.E.2d 870, 871 (1973). In the instant case, no complaint was made until over six months after the contract was awarded, and the instant suit was not filed until nearly three years later. Any dispute as to the bidding procedure is clearly moot.

In light of the foregoing, Respondent City of Canton maintains that Petitioner's O.R.C. section 153.50 claim is preempted by the NLRA and is moot, and respectfully requests that the petition for writ of certiorari be denied.

C. THE SUPREME COURT SHOULD ABSTAIN FROM GRANTING CERTIORARI IN ORDER TO AVOID NEEDLESS FEDERAL INTERFERENCE WITH A STATE ADMINISTRATIVE POLICY.

The State of Ohio's Department of Industrial Relations (DIR) is a state administrative agency with the responsibility of, among others, determining the prevailing wage to be paid for labor upon a public improvement. On January 29, 1988, Petitioner filed a complaint with the DIR that the work at issue upon the City of Canton's Water Pollution Control Center should be subject to the prevailing wage for "Plumbers's Work" as opposed to "Laborers' Work." When the DIR made the determination that the work at issue had been properly paid for according to the prevailing rate for Laborers, such conclusion was within the scope of the DIR's responsibilities. The determination was also consistent with such factors as past practice, existence of a bargaining relationship, industry practice, and efficiency of operations.

Upon this adverse determination, Petitioner proceeded to pursue the claim in the state courts of Ohio, including the Ohio Court of Claims, the Court of Appeals of Ohio (10th Appellate District), the Stark County Court of Common Pleas, the Court of Appeals of Ohio (5th Appellate District) and the Supreme Court of Ohio. Petitioner's state remedies are now exhausted; at every level, the state courts of Ohio have held adversely to Petitioner. But instead of accepting the situation as such, the Plumbers now petition the Supreme Court of the United States for Writ of Certiorari.

The Supreme Court should abstain from reviewing Petitioner's issues as an adequate state remedy has already been afforded and exhausted. Federal Courts should refrain from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. See, **Burford v. Sun Oil Co.**, 319 U.S. 315 (1943). The State of

Ohio has established the DIR with the purpose of addressing just such issues. Under **Burford,** the Court should abstain where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." **Colorado River Water Conservation District v. United States,** 424 U.S. 800, 814 (1976). As the state courts of Ohio have already made repeated determinations upon Petitioner's issues, the Supreme Court should afford a great deal of deference to their findings. See, **Lehman Bros. v. Schein,** 416 U.S. 386, 390 (1974). Federal review of these issues would do no more than foster duplicative litigation, and potentially cause "(d)elay, misunderstanding of local law, and needless federal conflict with the state policy." **Burford**, 319 U.S. at 327. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." **Railroad Comm'n of Texas v. Pullman Co.,** 312 U.S. 496, 500 (1941).

In light of the foregoing, Respondent City of Canton respectfully requests that the Supreme Court defer to the administrative agencies and state courts of Ohio, and deny Petitioner's petition for writ of certiorari.

CONCLUSION

For the reasons and law stated above, Respondent City of Canton respectfully opposes this Court's jurisdiction over this appeal and requests that petition for writ of certiorari be denied.

Respectfully submitted,

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